Supreme Court, U.S.
FILED

No. 98-___ 981291 FEB 11 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

Petitioners,

v.

DOUGLAS L. PATCH, BRUCE B. ELLSWORTH, and SUSAN S. GEIGER,

Respondents.

On Petition For Writ Of *Certiorari* To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF *CERTIORARI*

JOSEPH M. KRAUS
Vice President and General Counsel
Central Vermont Public Service Corporation
77 Grove Street
Rutland, VT 05701-3402
(802) 747-5429

DOM S. D'AMBRUOSO
JOHN T. ALEXANDER
RANSMEIER & SPELLMAN
One Capitol Street
P.O. Box 600
Concord, NH 03302-0600
(603) 228-0477

LEE A. FREEMAN, JR.*
JAMES T. MALYSIAK
JOHN F. KINNEY
GLYNNA W. FREEMAN
FREEMAN, FREEMAN & SALZMAN, P.C.
401 North Michigan Avenue
Suite 3200
Chicago, IL 60611-4207
(312) 222-5100

Counsel for Petitioners Connecticut Valley Electric Company and Central Vermont Public Service Corporation

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18899

QUESTION PRESENTED

Whether, as the First Circuit held, state public utility commissions have jurisdiction under an exception to this Court's decision in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), to bar recovery of wholesale power costs in retail rates by a utility that is part of an integrated interstate system, where the underlying power supply commitments of that system, the allocation of costs, and the setting of rates between affiliates of that system were reviewed and accepted as "just and reasonable" by the Federal Energy Regulatory Commission.

RULE 29.6 STATEMENT

Petitioner Central Vermont Public Service Corporation has no parent corporation and no non-wholly owned subsidiaries.

Petitioner Connecticut Valley Electric Company is the wholly-owned subsidiary of Central Vermont Public Service Corporation, and has no subsidiaries itself.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

FACTUAL BACKGROUND 5

REASONS FOR GRANTING THE PETITION 10

A. The First Circuit Erroneously Decided the Question Left Open in *Mississippi Power & Light* and Allowed the State Commission to Nullify a FERC Tariff by Denying Recovery of Costs under that Tariff as Imprudent 10

1. The Filed-Rate Doctrine Is a "Bright Line" Protecting FERC's Exclusive Jurisdiction from State Interference 11

2. The First Circuit's Decision Raises the Same Question Concerning State Erosion of the Filed-Rate Doctrine by Purported Prudence Determinations that this Court Granted *Certiorari* to Decide in *NOPSI IV* 12

B. The Logic of the Rule in *Mississippi Power & Light* Precludes the NHPUC's Collateral Attack upon the FERC-Authorized Rates and Allocation of Costs Between Central Vermont and Connecticut Valley 16

C. FERC Has Improperly Abdicated Its Exclusive Jurisdiction 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

FPC v. Southern California Edison Co., 376 U.S. 205 (1964) 12

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) ..... *passim*

Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951) 20, 21

Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) 2, 12, 13, 23

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 911 F.2d 993 (5th Cir. 1990), *cert. granted*, 499 U.S. 974, *cert. dismissed*, 502 U.S. 954 (1991) ..... *passim*

Northern Utilities, Inc. (Appeal of), 136 N.H. 449, 617 A.2d 1184 (1992) 23

Public Service Corp. of N.H. v. Patch, 161 F.3d 88 (1st Cir. 1998) ..... *passim*

Public Utils. Comm'n of Rhode Island v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927) 4, 21

CONSTITUTIONAL PROVISIONS AND STATUTES

Federal

Federal Power Act, 16 U.S.C. §§ 824(a) and (b)(1) ..1, 11

Public Utility Regulatory Policies Act, 16 U.S.C. § 824a-3..... 5

United States Constitution, Art. VI, cl. 2, Supremacy Clause 1, 10

United States Code, Judiciary and Judicial Procedure, 28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES – Continued

Page

State

New Hampshire Limited Electrical Energy Producers Act, N.H.R.S.A. ch. 362-A 5

New Hampshire Electric Utility Restructuring Act, N.H.R.S.A. §§ 374-F:1 to F:6 (Supp. 1996) 7

AGENCY ORDERS

Federal Energy Regulatory Commission

18 F.E.R.C. ¶ 62,196 (Feb. 1, 1982) 18

New Hampshire Public Utilities Commission

Order No. 2155 (1929) 5

Order No. 16,000 (Nov. 19, 1982)..... 6

Order No. 20,094 (Apr. 1, 1991)..... 15

Order No. 20,450 (Apr. 22, 1992)..... 6

Order No. 21,963 (Dec. 29, 1995).....7, 18

Order No. 22,509 (Feb. 28, 1997)..... 8

Order No. 22,514 (Feb. 28, 1997)..... 7

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Central Vermont Public Service Corporation and Connecticut Valley Electric Company respectfully petition this Court to issue a writ of *certiorari* to the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Appendix ("App.") 1-16) is reported at 161 F.3d 88 (1st Cir. 1998). The opinion of the District Court (App. 69-75) is unreported.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on December 3, 1998. On January 13, 1999, the Court of Appeals denied petitioners' timely petition for rehearing. (App. 18-19) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution and the provisions of the Federal Power Act, 16 U.S.C. §§ 824(a) and (b)(1), providing for the exclusive

jurisdiction of the Federal Energy Regulatory Commission over interstate transmission and wholesale sales of power, are reprinted at App. 158-159.

STATEMENT OF THE CASE

This petition presents the issue that was identified and explicitly left open by the Court in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988), and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972 (1986), and essentially the same question that the Court granted *certiorari* in *New Orleans Pub. Serv., Inc. v. Council of New Orleans* ("*NOPSI IV*") to resolve.[1] That issue is whether state public utility commissions have jurisdiction to bar recovery of wholesale power costs in retail rates by a utility that is part of an integrated interstate system, where the underlying power supply commitments of that system, the allocation of costs, and the setting of rates between the affiliates of that system were reviewed and accepted as "just and reasonable" by the FERC.

The First Circuit acknowledged that this "Court has treated a rate reflected in a FERC tariff as setting a rate level binding on a state commission in regulating the costs of the purchasing utility." *Public Service Corp. of N.H. v. Patch*, 161 F.3d 88, 94 (1st Cir. 1998). It also noted that this Court "has never squarely decided the question of

[1] *Certiorari* was granted in *NOPSI IV*, 499 U.S. 974 (1991), the case was fully briefed, but the parties settled and *certiorari* was dismissed. 502 U.S. 954 (1991).

whether imprudence is an escape hatch from the Commission's otherwise existing obligation to respect FERC's authority to determine the just and reasonable rate." *Id.* Nevertheless, the First Circuit went on to create just such a sweeping "escape hatch," effectively holding that whenever a state commission's order "is expressed as" conventional rate regulation, that expression is conclusive. The First Circuit made the determination as a matter of law, and deemed irrelevant the District Court's finding that the New Hampshire Public Utility Commission's ("NHPUC") refusal to allow Connecticut Valley to recover the cost of wholesale power supplied by Central Vermont pursuant to the RS-2 tariff was in reality an attempt to restructure these utilities under the guise of reviewing the prudence of their power supply arrangement.

The First Circuit's decision was based on its agreement with FERC's argument as an *amicus* (App. 13-14), that a state commission has authority to determine whether it is imprudent for a utility to purchase power under a FERC tariff unless the FERC has affirmatively mandated that allocation of power. (Brief of *Amicus Curiae* Federal Energy Regulatory Commission, pp. 8-9)[2] The distinction that the First Circuit thus drew between affirmative and passive action by FERC on a rate filing conflicts with the stated policy of *Mississippi Power & Light* – a policy that goes back to *Public Utils. Comm'n of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

---

[2] At the same time, FERC took "no position on whether Connecticut Valley had available other power supply choices, or whether Connecticut Valley acted imprudently." (App. 14, n.4)

Moreover, FERC's arguments in this case contrast sharply with the position it previously has taken, most recently before this Court in *NOPSI IV*. In the *amicus* brief filed by the Solicitor General on the merits in *NOPSI IV*, FERC stated that *Mississippi Power & Light's* delineation of FERC's exclusive jurisdiction leaves no "room for a state prudence inquiry into whether the operating utilities [should have] sold their respective shares of Grand Gulf [nuclear plant] capacity, and replaced that capacity with lower-cost coal-fired capacity." (Brief for the United States and the Federal Energy Regulatory Commission as *Amici Curiae* Supporting Petition, in No. 90-1156, at p. 15) Just as the NHPUC has done here, the local agency in *NOPSI IV* sought to carve out a permissible area for its "prudence" review by drawing a distinction between the utility's original commitment to acquire power by the utility, which FERC had approved, and the utility's subsequent opportunity not to take, or to resell, the power allocated, which FERC had not expressly addressed. FERC's view in *NOPSI IV* was: "For purposes of preemption, the distinction is non-existent." *Id.*

The exception that FERC encouraged the First Circuit to read into *Mississippi Power & Light* has far-reaching implications for the restructuring of the electrical power industry which is taking place across the country. FERC's change in position amounts to an abdication of its role as arbiter of cost allocations between and among the states. State regulatory commissions will now be free to second-guess FERC approval and deny the recovery of wholesale power costs incurred to serve multistate systems (and thereby trap or shift the costs to other jurisdictions) if the state agency can offer any colorable basis for cloaking its

actions as normal ratemaking. The First Circuit's ruling will impose dire financial consequences on Connecticut Valley and Central Vermont, and has the potential to have the same impact on other multistate systems as well.

FACTUAL BACKGROUND

Connecticut Valley is a New Hampshire public utility that supplies electric power to approximately 10,000 customers along the New Hampshire-Vermont border. It is a wholly-owned subsidiary of Central Vermont, a Vermont public utility. Connecticut Valley has no employees of its own; all services are provided by Central Vermont. The NHPUC required Central Vermont to create Connecticut Valley as a subsidiary to handle the retail sale of the system's power in New Hampshire, and also mandated that Central Vermont supply the power at a price that would allow the retail rates charged in New Hampshire not to exceed the retail rates charged by Central Vermont in Vermont. (Order No. 2155 (1929), at p. 333) Since 1983 Central Vermont has supplied power to Connecticut Valley under a FERC-approved tariff, known as the RS-2 Rate Schedule ("RS-2").[3] This tariff allocates, on a *pro-rata*

[3] This intracompany, all-requirements, arrangement currently accounts for approximately 76% of the power that Connecticut Valley uses to serve the system's New Hampshire load. Connecticut Valley must purchase the remainder of its power needs from high-cost "qualifying facilities" under the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. § 824a-3, and also under New Hampshire's Limited Electrical Energy Producers Act, N.H.R.S.A. ch. 362-A.

basis, the system-wide costs for the long-term power supply resources acquired by Central Vermont to provide reliable service to the consolidated system's customers in both New Hampshire and Vermont.[4] Central Vermont thus earns no return on this intracompany transfer of power. Each year the RS-2 rates are adjusted pursuant to its formula to reflect actual costs, and these adjustments are reviewed by FERC.

The NHPUC has always regulated Connecticut Valley as part of this consolidated interstate system, specifically acknowledging that this system is not different in an economic sense from the integrated companies in *Mississippi Power & Light*:

> The affiliated non-generating utility and its supplier (affiliate or parent) for rate making purposes can be treated as a single corporate entity. As such, it is identical to an integrated company which both generates and distributes power. (Order No. 16,000; Nov. 19, 1982, at p. 838)[5]

At the same time, the NHPUC has consistently recognized in its regulation of Connecticut Valley and its rate adjustment proceedings that the prudence of the costs incurred by the integrated system and the allocation of

---

[4] Central Vermont committed to the most recent of these purchases nearly a decade ago under a long-term contract with Hydro-Quebec.

[5] In its bi-annual review of the system's least cost integrated total resource plans, the NHPUC expressly noted that "we have taken into account Connecticut Valley's affiliation with Central Vermont and Connecticut Valley's LCIP filing reflects planning for the consolidated company." (Report and Order No. 20,450; April 22, 1992)

those costs between its two affiliates are subject to FERC's exclusive jurisdiction.[6] Despite this fact, the NHPUC never objected in FERC's annual review proceeding to the consolidated system's power supply costs or Connecticut Valley's acquisition of power under the terms of the RS-2 tariff.

In May 1996, New Hampshire enacted the Electric Utility Restructuring Act ("Restructuring Act"), N.H.R.S.A. §§ 374-F:1 to F:6 (Supp. 1996), which seeks to impose a fundamental change from the longstanding regulatory system in each utility served a defined territory and recovered its costs of providing service under a cost-based ratemaking methodology. The restructuring is intended to create a competitive system without controls on the entry of competing utilities and with prices set by the market. To achieve its goals, the New Hampshire Legislature directed the NHPUC to develop a restructuring plan that would implement the goal of retail choice by January 1, 1998.

On February 28, 1997, the NHPUC issued its "Final Plan" in its Electric Utility Restructuring Docket (Order No. 22,514), which *inter alia* included an order directing Connecticut Valley to cancel its RS-2 wholesale power supply arrangement with Central Vermont and denying Connecticut Valley any recovery of its stranded costs for

---

[6] For instance, in granting Connecticut Valley's 1996 fuel cost adjustment, the NHPUC stated that any challenge to Connecticut Valley's obligation for its wholesale power costs arising from Central Vermont's Vermont Joint Owners' ("VJO") contract with Hydro-Quebec must be pursued "at FERC during its review of the RS-2 costs." (Order No. 21,963, Dec. 29, 1995)

the system's underlying purchase commitments. (Order No. 22,509)

Public Service Company of New Hampshire ("PSNH") filed suit in federal court challenging the NHPUC's restructuring plan on preemption and constitutional grounds. The District Court issued a preliminary injunction barring implementation of the plan until the case was tried, which the First Circuit has affirmed. (App. 65-68) Central Vermont and Connecticut Valley were granted leave to intervene in June 1997 to assert similar challenges to the restructuring plan.

After restructuring was enjoined, the NHPUC entered an order on December 31, 1997, to the same effect as its February 28, 1997 order denying stranded cost recovery that had been stayed by the District Court. This later order froze Connecticut Valley's rates at the existing 1997 level on the ground that Connecticut Valley was imprudent for not terminating RS-2 under a clause providing that the power supply arrangement would continue without modification except upon one-year's notice by either affiliate or mutual consent.[7] Two months later,

---

[7] Because the intrasystem transfers of wholesale power from Central Vermont to Connecticut Valley occur in interstate commerce, the system was required to file with FERC a wholesale rate schedule governing the transactions. Connecticut Valley is a wholly-owned subsidiary of Central Vermont, so the termination clause of the RS-2 rate schedule is legally irrelevant to the issue of preemption. Since Central Vermont completely controls Connecticut Valley, there can be no independent right to terminate. This is consistent with the NHPUC's imposition of the duty upon the Central Vermont system – not Connecticut Valley alone – to ensure that it had

on February 23, 1998, the NHPUC announced that Connecticut Valley's recovery of its wholesale power costs through its retail rates would be reduced and capped at $.04 per kilowatt hour, an amount that the NHPUC viewed as the current market price. That price had no relationship whatsoever to Connecticut Valley's actual costs or the RS-2 wholesale tariff.

The NHPUC's December 31, 1997 order and its February 23, 1998 announcement forced Connecticut Valley to take $6.7 million in write-offs, wiping out its common equity, which in turn caused Connecticut Valley's lender to issue a notice of default and Connecticut Valley's independent auditor to issue a "going concern" opinion. In order to prevent irreparable financial harm to Connecticut Valley, Chief Judge Lagueux, designated to sit as a New Hampshire judge for purposes of this case, entered the injunction at issue on April 9, 1998, directing the NHPUC to permit Connecticut Valley to recover its power costs under the 1998 adjustments to the RS-2 tariff. The District Court enjoined the NHPUC's December 31, 1997 order as an impermissible collateral attack on the prudence of Connecticut Valley's wholesale power acquisition under the FERC-authorized RS-2 rates and an "end run" around the injunction against restructuring. (App. 72) This injunction enabled Connecticut Valley to reverse the write-offs and cure its loan default.

The First Circuit vacated the District Court's April 9, 1998 preliminary injunction on the ground that the

---

sufficient long-term resources to provide reliable service to New Hampshire customers.

NHPUC's disallowance of FERC-approved rates in its December 31, 1997 order "is expressed as an exercise of conventional cost-based rate regulation," and so fell within what the First Circuit characterized as an "escape hatch" to the filed-rate doctrine. (App. 11-12, 13-14) In reaching this conclusion, the First Circuit deemed irrelevant the District Court's uncontroverted findings that the NHPUC's December 31, 1997 order was not rate regulation but simply a pretense to implement restructuring in violation of the Court's earlier injunction staying the NHPUC's February 28, 1997 order which required that Connecticut Valley terminate the RS-2 power supply arrangement.

REASONS FOR GRANTING THE PETITION

A. The First Circuit Erroneously Decided the Question Left Open in *Mississippi Power & Light* and Allowed the State Commission to Nullify a FERC Tariff by Denying Recovery of Costs under that Tariff as Imprudent.

Although this Court has never decided whether there is any "prudence review" exception to the filed-rate doctrine, the logic and federal policies supporting the holding of *Mississippi Power & Light* demonstrate that the First Circuit has created an unduly broad and unconditional exception, which requires only that a state commission call its action a prudence review. Thus, for the same reasons that this Court granted *certiorari* in *NOPSI IV* to clarify the role of state prudence reviews under *Mississippi Power & Light*, *certiorari* should be granted here to resolve this important and recurring issue.

1. The Filed-Rate Doctrine Is a "Bright Line" Protecting FERC's Exclusive Jurisdiction from State Interference.

For the past fifteen years, Connecticut Valley has acquired the vast majority of its power through its parent Central Vermont under the RS-2 wholesale power supply requirements tariff. FERC has exclusive jurisdiction under the Federal Power Act over the rates and other terms and conditions for such wholesale power transactions. 16 U.S.C. §§ 824(a) and (b)(1). Given FERC's authorization of the RS-2 tariff, the Supremacy Clause bars the NHPUC from disallowing rates necessary for Connecticut Valley to recover its costs under RS-2.

As this Court has stressed, Congress enacted the Federal Power Act to displace inconsistent and often parochial attempts by one state to shift wholesale power costs to another state and to substitute comprehensive federal regulation of wholesale power transactions:

> [O]ur decisions have squarely rejected the view . . . that the scope of FPC [now FERC] jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

FPC v. Southern California Edison Co., 376 U.S. 205, 215-216 (1964).

A key component of FERC's exclusive jurisdiction over wholesale power sales is the filed-rate doctrine and the related prohibition against state commission refusal to allow utilities to recover FERC-authorized wholesale power costs through retail rates. As this Court held in *Nantahala*:

> The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate. . . . Such a "trapping" of costs is prohibited. 476 U.S. at 970.

In *Mississippi Power & Light*, this Court reaffirmed that its holding in *Nantahala* compelled the conclusion that a state commission can neither enter an order trapping FERC-authorized wholesale power costs nor can it "undertake a 'prudence' review for the purpose of deciding whether to enter such an order." 487 U.S. at 372.

2. The First Circuit's Decision Raises the Same Question Concerning State Erosion of the Filed-Rate Doctrine by Purported Prudence Determinations that this Court Granted *Certiorari* to Decide in *NOPSI IV*.

As the First Circuit acknowledged, this Court has never squarely decided whether there is any exception to

the filed-rate doctrine for prudence reviews by a state regulator of a utility's wholesale power purchases pursuant to a FERC-authorized wholesale tariff. In both *Nantahala* and *Mississippi Power & Light*, this Court referred to such a possible exception but did not decide whether it was valid, much less its parameters. *Mississippi Power & Light Co.*, 487 U.S. at 373; *Nantahala*, 476 U.S. at 972. In *NOPSI IV*, this Court granted *certiorari* to decide that very issue under circumstances strikingly similar to this case. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 499 U.S. 974 (1991). *NOPSI IV* was fully briefed, but the parties settled before the case was argued and decided. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 502 U.S. 954 (1991).

The First Circuit's deference to the NHPUC's claim that it was engaged in ordinary ratemaking closely parallels the reasoning of the Fifth Circuit in the *NOPSI IV* decision. The Fifth Circuit held that the Council of New Orleans was "not facially preempted" by the FERC-approved allocation of nuclear capacity because the Council represented that it was looking at the prudence of the local utility's purchases under that allocation as part of normal ratemaking[8] and that "FERC did not assert jurisdiction to determine NOPSI's prudence in not acting to minimize its losses." *New Orleans Pub. Serv., Inc. v.*

---

[8] "Rather, the Council maintains that it has examined the prudence of NOPSI's failure, after the risk of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the normal ratemaking step of making NOPSI's shareholders rather than the ratepayers bear the consequences." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 911 F.2d 993, 998 (5th Cir. 1990).

Council of New Orleans, 911 F.2d 993, 1002 (5th Cir. 1990) (footnote omitted). These were the issues the Court undertook to review upon petition of the utility.

Here, too, the NHPUC has represented that it was reviewing only Connecticut Valley's decision not to terminate the RS-2 power supply arrangement rather than the prudence of its wholesale rates or Central Vermont's commitments to obtain power for Connecticut Valley. But it is clear here, just as it was in *NOPSI IV* (where the New Orleans Council's evident purpose was to evade FERC's allocation of power and costs), that the NHPUC is attempting to invalidate the FERC-authorized wholesale tariff. To justify its current position, the NHPUC seized upon the one-year termination clause as providing a basis to isolate its *ex post facto* prudence review from FERC's exclusive jurisdiction over the long-standing power supply relationship between Central Vermont and Connecticut Valley. Instead of preventing such state encroachment of FERC's domain, the First Circuit simply accepted the NHPUC's characterization of the provision as permitting Connecticut Valley to terminate the RS-2 tariff and the underlying power supply arrangement on one-year's notice. The First Circuit made that holding despite (a) the record before the District Court that the NHPUC had regulated Connecticut Valley on the understanding that the RS-2 tariff was a mutual long-term commitment to provide a reliable source of power to New Hampshire consumers and (b) the District Court's findings that the NHPUC's collateral attack on the RS-2 tariff was not legitimate ratemaking but rather a pretense (an "end run") to evade the District Court's preliminary injunction against restructuring. Significantly, the NHPUC never

objected at FERC to the prudence of the RS-2 tariff and in fact the NHPUC consistently treated the RS-2 tariff as a long-term commitment that neither affiliate could break just because the market changed.[9]

The circumstances of this case present an even more compelling issue for review than *NOPSI IV*. First, as in *NOPSI IV*, the state regulator's actions will force the ratepayers of another state (here, Vermont) or the shareholders of an interstate corporation to absorb the disallowed costs. It was precisely this type of parochial regulatory action that led to FERC's creation in the first place.

Second, unlike *NOPSI IV*, the NHPUC's actions not only violate the filed-rate doctrine but, unless enjoined, will cause the dissolution of an interstate power system within FERC's exclusive jurisdiction. The "trapping" of

---

[9] During most of the period that Connecticut Valley has received its power under the RS-2 tariff, the NHPUC reviewed and analyzed the commitments that Central Vermont had made to supply wholesale power to Connecticut Valley, and approved that process as assuring a reliable long-term supply of power for New Hampshire. Significantly, during that same period, the NHPUC instructed New Hampshire utilities not to rely unduly on short-term power sources. In one instance, the NHPUC objected when a utility was planning to rely upon supply commitments of less than *ten* years for 60% of its power needs. (Order No. 20,094; Apr. 1, 1991) However, if Central Vermont could have terminated its obligation to supply Connecticut Valley's power requirements under the RS-2 tariff on merely one-year's notice, as the NHPUC now expediently contends, Connecticut Valley for years would have been relying for nearly 80% of its power needs on a source committed for only *one* year, a situation the NHPUC would not have tolerated.

wholesale power costs in this case will result in Connecticut Valley's insolvency, the premature termination of the RS-2 tariff without any review by FERC, and thus the end of the integrated Central Vermont/Connecticut Valley system that has served customers in both New Hampshire and Vermont for fifty years.[10]

B. The Logic of the Rule in *Mississippi Power & Light* Precludes the NHPUC's Collateral Attack upon the FERC-Authorized Rates and Allocation of Costs Between Central Vermont and Connecticut Valley.

Under *Mississippi Power & Light*, the NHPUC cannot be permitted to collaterally attack the FERC-authorized wholesale arrangements of an interstate system just because one of the affiliates sells power at retail in New Hampshire. Moreover, until its restructuring initiative, the NHPUC fully acknowledged that it had to raise at FERC any objections it had to the RS-2 tariff or Central Vermont's commitments to obtain power for the New Hampshire segment of the system.

In *Mississippi Power & Light*, the affiliates of an integrated power system made commitments to provide long-term power, which included large investments in nuclear power facilities. However, system-wide demand turned out to be lower than originally projected, and the

---

[10] This result is precisely what the NHPUC has sought through its restructuring plan, but has been blocked from implementing by the District Court's preliminary injunction pending trial of the utilities' preemption and constitutional claims. The First Circuit has enabled the NHPUC to achieve its restructuring objective instead by creating a sweeping exception to the filed-rate doctrine.

costs of the nuclear plants were much higher than estimated. The affiliates entered into system agreements allocating those above-market costs among themselves on the basis of their relative need for that capacity. FERC, however, ordered that the allocation be made on the basis of each affiliate's proportionate share of the entire system demand. 487 U.S. at 362-364.

The Mississippi Supreme Court subsequently held that because FERC had never ruled on the prudence of the decision to complete the Grand Gulf nuclear plant, the state regulatory commission could review the prudence of that decision to determine whether Mississippi Power should be allowed to recover through its retail rates the costs allocated by FERC's order. *Id.* at 365-368. This Court reversed, however, ruling that the state commission was preempted from second-guessing FERC's power and cost allocation, notwithstanding that FERC made no express finding of prudence: "The question of prudence was not discussed . . . because no party raised the issue, not because it was a matter beyond the scope of FERC's jurisdiction." *Id.* at 375. Moreover, the prudence of the power system's decision to complete the nuclear plant also determined the reasonableness of the costs each affiliate was allocated, which was binding on the state commission under the filed-rate doctrine.

Similarly, here, the purchased power commitments that Central Vermont made decades ago to ensure a long-term supply for Connecticut Valley's New Hampshire customers now result in wholesale power costs higher than short-term market prices. The RS-2 tariff provides that Connecticut Valley gets 6% of that power and 6% of

the related costs in line with its proportionate contribution to the overall peak demand of the entire Vermont/New Hampshire system.[11] FERC reviewed and accepted the rates based on this allocation of resources and costs in the RS-2 tariff. (18 F.E.R.C. ¶ 62,196; Feb. 1, 1982)

The NHPUC never challenged the prudence of Central Vermont's system-wide purchased power commitments at FERC at the time they were made. Nor has the NHPUC objected in any of the annual FERC rate adjustment reviews to the prudence of the underlying purchased power commitments by Central Vermont and Connecticut Valley, the reasonableness of the resulting costs and rates in the RS-2 tariff, or the prudence of the power acquisitions by Connecticut Valley. This inaction by the NHPUC was not inadvertent, for prior to embarking on restructuring, the NHPUC consistently acknowledged that FERC has exclusive jurisdiction over the reasonableness of Connecticut Valley's wholesale costs under RS-2 and that the proper procedure for challenging Connecticut Valley's wholesale costs is to file a specific objection with FERC. (*See, e.g.*, Order No. 21,963; Dec. 29, 1995)

Under this Court's explicit holdings, review and acceptance of the RS-2 tariff by FERC forecloses the NHPUC's collateral attack on the "prudence" of Connecticut Valley's purchases under that tariff. "The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The

---

[11] This is precisely the method that FERC approved in *Mississippi Power & Light*, 487 U.S. at 360-364.

only appropriate forum for such a challenge is before the [Federal Energy Regulatory] Commission or a court reviewing the Commission's order." *Mississippi Power & Light*, 487 U.S. at 375.

Just as this Court in *Mississippi Power & Light* invalidated a so-called "prudence review" by the state commission that overrode a FERC-approved cost allocation of the utility's nuclear power investment, so in this case the District Court properly enjoined the NHPUC from denying recovery of wholesale power costs under the FERC-authorized RS-2 tariff by claiming *ex post facto* that it was now imprudent for Connecticut Valley to continue its consolidated power supply arrangement with Central Vermont.

Therefore, just as in *NOPSI IV*, the issue of state authority to decide the prudence of wholesale power transactions between affiliates of an interstate system merits review and resolution in this case.

C. FERC Has Improperly Abdicated Its Exclusive Jurisdiction.

The First Circuit's decision was heavily influenced by FERC's argument that the filed-rate doctrine did not apply because FERC had not affirmatively mandated the allocation of power resources and costs between Central Vermont and Connecticut Valley. (App. 13-14, 20-21)[12]

---

[12] In denying the motion of Central Vermont and Connecticut Valley for a stay of its mandate, the First Circuit made special reference to the fact that FERC opposed the claim

FERC's interpretation of the filed-rate doctrine, however, misreads the clear language of *Mississippi Power & Light*. For purposes of preemption, it does not matter that FERC accepted the RS-2 tariff (and its explicit power supply and cost allocation) for filing rather than entering its own order affirmatively mandating the allocation of wholesale power and costs between Connecticut Valley and Central Vermont. When it announced the filed-rate doctrine under the Federal Power Act, this Court stated unequivocally that a filed rate preempts state jurisdiction regardless whether the rate filed with FERC is directly fixed by FERC or instead is "merely accepted by the Commission." *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-252 (1951).

There is no legal or logical basis to distinguish between a direct allocation of power and costs by FERC through its own order and FERC's acceptance of rates charged under an allocation by the parties. *Mississippi Power & Light* stressed the principle that a state's interference with an interstate power supply arrangement among affiliates is preempted by FERC's exclusive jurisdiction even though FERC does not affirmatively exercise that jurisdiction:

> The Mississippi Supreme Court erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings. . . . We have long rejected this sort of

---

that the NHPUC's action was pre-empted by the filed-rate doctrine. (App. 20-21)

> "case-by-case analysis of the impact of state regulation upon the national interest" in power regulation cases. . . . Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. 487 U.S. at 374 (citations omitted).[13]

The NHPUC's orders denying Connecticut Valley the right to recover its wholesale power costs under RS-2 will necessarily force Central Vermont to absorb those fixed or "stranded" costs because it has no other market for the power it contracted to purchase for Connecticut Valley. This Court decided long ago that the public utilities commission of one state cannot burden another state with such costs "in the guise of protection to their respective local interests." *Public Utils. Comm'n of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 90 (1927). In response to *Attleboro*, Congress enacted the Federal Power Act, which gave the Federal Power Commission (now FERC) exclusive authority to regulate rates for interstate wholesale power sales. The NHPUC's action flies in the face of policy underlying the Federal Power Act and the exclusive jurisdiction that Congress has conferred on FERC to make certain that states do not place a burden on interstate commerce by their regulation of local utilities. Given this Congressional mandate, it is

---

[13] Under FERC's new position, utilities will no longer be able to rely upon FERC acceptance of their rate and allocation schedules for filing, but will be required to seek an express FERC order mandating such schedules in a contested setting. As *Montana-Dakota Utilities* demonstrates, that has never been required by the filed-rate doctrine.

incumbent upon FERC to protect its jurisdiction. As Justice Scalia stressed when concurring in *Mississippi Power & Light*:

> What goes along with the jurisdiction is the responsibility, where the issue is appropriately raised, to protect against allocations that have the effect of making the ratepayers of one State subsidize those of another. 487 U.S. at 383.

Just as in *Mississippi Power & Light*, 487 U.S. at 357, the FERC tariff in this case reflects an allocation of power and costs between affiliates of an integrated interstate power system in proportion to their relative contributions to the peak system demand. The NHPUC had full opportunity to challenge at FERC the power supply commitments underlying the RS-2 tariff and its allocation of the wholesale power costs. The NHPUC never did so. Consequently, there was no occasion for FERC to resolve any contested issue regarding the rates or allocation of costs between Central Vermont and Connecticut Valley. But, contrary to the position of FERC and the First Circuit, the NHPUC's action is preempted because of FERC's exclusive jurisdiction to regulate; preemption does not depend on an affirmative exercise of that jurisdiction. As Justice Scalia's concurrence in *Mississippi Power & Light* stresses:

> It is true, of course, that FERC did not conduct such an examination in the present case; but . . . neither did any party ask it to do so. That failure to ask does not take the issue out of FERC's jurisdiction and recommit it to the States. 487 U.S. at 379.

NHPUC cannot claim after the fact that it is imprudent for Connecticut Valley to take the power it was allocated

under the FERC tariff, and FERC has no authority to waive the jurisdictional bar to this improper collateral attack.[14]

The NHPUC's nullification of the FERC-authorized RS-2 tariff threatens to destroy the Connecticut Valley/Central Vermont integrated system. FERC, as *amicus*, has expressed a view patently at odds with the duty imposed on it by Congress to prevent state commissions from eroding FERC's exclusive jurisdiction by casting their actions as conventional prudence review. Therefore, the issue reserved for later decision in *Nantahala* and *Mississippi Power & Light*, and poised for decision in *NOPSI IV*, must now be decided. This issue is both significant and immediate as the First Circuit's decision will impact other interstate power systems that are subject to utility restructuring being implemented by virtually every state. The First Circuit's decision and FERC's abdication leaves the strong federal policy defined by *Mississippi Power &*

---

[14] This is not the first time that FERC has faltered in its duty to enforce the filed-rate doctrine. When it deregulated the natural gas industry, FERC urged state commissions to require local distribution companies to absorb some of their admittedly prudent wholesale costs rather than passing them on in full to retail customers. When the NHPUC entered such an order, the New Hampshire Supreme Court overruled it and ordered that the local distribution companies be permitted to recover all their wholesale costs in their retail rates. It held that FERC could not create expedient exceptions to the filed-rate doctrine: "Just as the FERC-approved rates are binding upon States, FERC-approved rates are binding upon the FERC because Congress established a bright line beyond which the FERC cannot step." *Appeal of Northern Utilities, Inc.*, 136 N.H. 449, 455, 617 A.2d 1184, 1187 (1992).

Light undefended and vulnerable to parochial state action that attempts to shift stranded costs to neighboring states.

CONCLUSION

For the reasons stated above, the petitioners ask the Court to issue a writ of *certiorari* to review and reverse the First Circuit's decision.

Respectfully submitted,

JOSEPH M. KRAUS
Vice President and
General Counsel
Central Vermont Public
Service Corporation
77 Grove Street
Rutland, VT 05701-3402
(802) 747-5429

DOM S. D'AMBRUOSO
JOHN T. ALEXANDER
RANSMEIER & SPELLMAN
One Capitol Street
P.O. Box 600
Concord, NH 03302-0600
(603) 228-0477

LEE A. FREEMAN, JR.*
JAMES T. MALYSIAK
JOHN F. KINNEY
GLYNNA W. FREEMAN
FREEMAN, FREEMAN &
SALZMAN, P.C.
401 North Michigan
Avenue
Suite 3200
Chicago, IL 60611-4207
(312) 222-5100
Counsel for Petitioners Connecticut Valley Electric Company and Central Vermont Public Service Corporation

Dated: February 10, 1999

**Counsel of Record*

United States Court of Appeals
For the First Circuit

No. 98-1629

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, ET AL.,
Plaintiffs, Appellees,

and

CONNECTICUT VALLEY ELECTRIC COMPANY and
CENTRAL VERMONT PUBLIC SERVICE
CORPORATION,
Plaintiffs/Intervenors, Appellees,

v.

DOUGLAS L. PATCH, CHAIRMAN OF THE
STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL.,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Ronald R. Lagueux,* *U.S. District Judge*]

Before
Boudin, *Circuit Judge*,
Bownes and Reavley,** *Senior Circuit Judges.*

Dennis Lane with whom *Michael E. Tucci* and *Morrison & Hecker, L.L.P.* were on brief for defendants Douglas L. Patch, Bruce B. Ellsworth and Susan S. Geiger.

---

*Of the District of Rhode Island, sitting by designation.

**Of the Fifth Circuit, sitting by designation.

Sarah B. Knowlton, Steven V. Camerino and *McLane, Graf, Raulerson & Middleton, P.A.* on brief for City of Claremont, New Hampshire, Amicus Curiae.

Douglas W. Smith, General Counsel, *John H. Conway*, Deputy Solicitor, and *Deborah B. Leahy* on brief for Federal Energy Regulatory Commission, Amicus Curiae.

Philip T. McLaughlin, Attorney General, *Martin P. Honigberg*, Senior Assistant Attorney General, Civil Bureau, *James K. Brown, John A. Shope* and *Foley, Hoag & Eliot LLP* on brief for Jeanne Shaheen, Governor of the State of New Hampshire, Amicus Curiae.

F. Anne Ross and *F. Anne Ross, P.C.* on brief for Retail Merchants Association of New Hampshire, New Hampshire Office of the Consumer Advocate, Campaign for Ratepayers Rights, Community Action Program, City of Manchester and Cabletron Systems, Inc., Amici Curiae.

Lee A. Freeman, Jr., and *Allan B. Taylor* with whom *John F. Kinney, James T. Malysiak, Glynna W. Freeman, Freeman, Freeman & Salzman, P.C., Joseph M. Kraus*, Vice President and General Counsel, Central Vermont Public Service Corporation, *Dom S. D'Ambruoso, John T. Alexander, Ransmeier & Spellman, John B. Nolan, Allan B. Taylor, Gary M. Becker, Robert W. Clark* and *Day, Berry & Howard* were on brief for appellees Connecticut Valley Electric Company, Central Vermont Public Service Corporation, Public Service Company of New Hampshire, North Atlantic Energy Corporation, Northeast Utilities and Northeast Utilities Service Company.

December 3, 1998

BOUDIN, *Circuit Judge*. On this appeal, we consider whether the district court properly enjoined a state utility commission to allow a specific increase in electric utility rates sought by Connecticut Valley Electric Service Company ("Connecticut Valley"). In timing and background facts, there is considerable overlap between this decision and our companion decision today in No. 98-1764, which arises out of the same district court proceeding. The reader's familiarity with that decision is assumed, but additional background is required to understand the events and legal issues peculiar to Connecticut Valley.

I. BACKGROUND

Connecticut Valley is an electric utility that provides retail service to end-user customers in certain New Hampshire communities. Its rates are set forth in a retail tariff subject to the authority of the New Hampshire Public Utilities Commission ("the Commission"). R.S.A. § 378:7 (1997); *see Legislative Util. Consumers' Council v. Public Serv. Co.*, 402 A.2d 626, 631 (N.H.1979). The company does not generate any electric power; it is part of an integrated public utility system and purchases power from others.

About 76 percent of the power purchased by Connecticut Valley is acquired from its parent company, Central Vermont Public Service Company ("Central Vermont"). Rates and contracts for wholesale transactions

in electric power, assuming an interstate nexus, are normally subject to regulation by the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act, 16 U.S.C. §§ 824, 824d (1994). FERC has accepted for filing the tariffs and contract under which Central Vermont supplies power to Connecticut Valley. *See Appeal of Sinclair Mach. Prods., Inc.*, 498 A.2d 696, 698-99 (N.H.1985).

In supplying Connecticut Valley and its own retail customers in Vermont, Central Vermont purchases about 35 to 40 percent of its power under a long-term supply contract with Hydro Quebec. A contract of this kind provide price and supply protection (the Hydro Quebec contract runs until 2016), but also commits the purchaser to buy even if market conditions change. Apparently, the Hydro Quebec contract price now exceeds wholesale electricity prices available in New England, so Connecticut Valley could lower its power costs in the short run if it ceased to buy from Central Vermont.

The existing contract between Connecticut Valley and Central Vermont permits Connecticut Valley to terminate its purchase contract on short notice; oversimplifying slightly, the notice period is one year. Although Connecticut Valley says that the Commission initially encouraged its contract with Central Vermont, the Commission has recently criticized the purchases, saying that the contract was being continued for the benefit of Central Vermont and that the purchases could be regarded as imprudent from Connecticut Valley's standpoint.

In February 1997, when adopting the Final Plan discussed in our companion decision, the Commission's

implementing order as to Connecticut Valley addressed the issue directly. *See* Order No. 22,509. The Commission's order said that in calculating the costs that Connecticut Valley would be able to recover through its own retail rates, the Commission would disallow the cost of power acquired from Central Vermont to the extent that it exceeded the cost of power generally available at wholesale prices in Connecticut and in New Hampshire. *See id.*

Central Vermont responded in June 1997 by initiating a proceeding before FERC to terminate the contract with Connecticut Valley; the request for termination, however, was contingent on FERC's approval of a termination charge by which Central Vermont could effectively impose upon Connecticut Valley a share of the "loss" resulting from the difference between the long-term Hydro Quebec rate and the lesser market rate now available. FERC rejected the Central Vermont proposal, but invited Central Vermont to return to FERC with a differently structured plan for making Connecticut Valley share in some measure in whatever loss resulted from termination.[1]

The next event leading to the present appeal occurred in Fall 1997, when Connecticut Valley submitted

---

[1] *See Central Vermont Pub. Serv. Corp.*, Order Rejecting Standard Cost Amendment, 81 F.E.R.C. ¶ 61,336, 1997 WL 779009 (F.E.R.C.), at *1 (Dec. 18, 1997). Central Vermont filed a proposed exit fee with FERC in March 1998. *See Central Vermont Pub. Serv. Corp.*, Order Accepting for Filing and Suspending Proposed Exit Fee Provision, 82 F.E.R.C. ¶ 61,237, 1998 WL 111732 (F.E.R.C.), at *1 (Mar. 11, 1998). FERC accepted the proposal for filing and suspended the fee subject to a hearing which has not yet occurred. *See id.*

tariff changes to the Commission to secure an increase in Connecticut Valley's own retail rates. The purpose of the proposed increase, sought to be made effective on January 1, 1998, was simply to pass through to customers increases in Central Vermont's wholesale rate under its FERC tariff. It appears that the rate charged to Connecticut Valley depended on Central Vermont's own costs of generating and acquiring power, which vary from year to year. The Commission had previously allowed Connecticut Valley to make corresponding increases in its retail rates without much fuss or delay.

This time the story was different. The Commission announced on December 31, 1997, that it would not allow Connecticut Valley to increase its retail rates to take account of the increase in Central Vermont's wholesale rate charged to Connecticut Valley. *See* Order No. 22,815. The Commission's order acknowledged that this would cause a shortfall for Connecticut Valley, but it said that the utility should earlier have terminated its contract with Central Vermont. The Commission said it would later determine what prudently acquired wholesale power should cost Connecticut Valley, creating the threat of an actual decrease in Connecticut Valley's retail rates.

On January 19, 1998, Connecticut Valley and Central Vermont filed a motion in the district court in the pending litigation brought by Public Service Company of New Hampshire ("PSNH"), described in our companion opinion. Connecticut Valley and Central Vermont, along with other utilities in New Hampshire, had already intervened in that case. *See Public Serv. Co. v. Patch*, 173 F.R.D. 17 (D.N.H.1997). In their motion, Connecticut Valley and Central Vermont sought a temporary restraining order

and then a preliminary injunction to require the Commission to put into effect the rate increases that the Commission had disallowed in December 1997.

In the TRO motion, the two utilities argued that the Commission's rejection of the rate increases effectively violated the injunction against the Final Plan previously obtained by PSNH, and further argued that, independent of the district court's prior orders, the Commission's December 31, 1997, order was "preempted" by FERC's exclusive jurisdiction over the wholesale rate contract and over Central Vermont's pending application to modify the contract to impose an exit fee. The motion was also accompanied by affidavits of the two utilities' vice president and the companies' independent auditor attesting to the severe economic harm, including possible bankruptcy of Connecticut Valley, threatened by the Commission's action.

On January 20, 1998, the Commission granted rehearing in the rate proceeding and allowed Connecticut Valley to file additional testimony, but the Commission did not authorize the retail rate increases sought by the utility. In February 1998, the Commission filed papers in the district court opposing the TRO and disputing jurisdiction, the merits, and the predictions of irreparable injury. Further materials were filed by Connecticut Valley and Central Vermont, and on April 3, 1998, the district court held a hearing on the request for a TRO and preliminary injunction.

At the hearing, there were extensive arguments and counsel brought the district court up to date as to intervening developments. The court then took a brief recess

and returned to make extensive oral rulings, generally favorable to Connecticut Valley and Central Vermont. Describing the Commission's conduct as a violation of the court's earlier grant of injunctive relief against the Final Plan, the court directed counsel for the utilities to prepare a preliminary injunction.

On April 9, 1997, the district court entered a formal preliminary injunction adopting its oral rulings as findings of fact and conclusions of law. The injunction specifically directed the Commission to allow Connecticut Valley to recover through retail rates the full cost of wholesale power obtained from Central Vermont pursuant to the latter's FERC tariffs. It appears that since that time – possibly retroactively to January 1, 1998 – Connecticut Valley has been obtaining the increased rates that it sought in its Fall 1997 filing.

The Commission has now appealed from the April 9, 1998, injunction. Its appeal raises threshold objections to the grant of the injunction, it denies that the utilities are likely to prevail on the merits, and it treats very briefly the issue of irreparable injury. We consider the arguments in the same order. The familiar requirements for a preliminary injunction and the standards for appellate review are set forth in our companion decision.

II. DISCUSSION

At the threshold, the strictest limit on the district court's jurisdiction is the Johnson Act, 28 U.S.C. § 1342 (1994). This statute, described more fully in our companion decision, prohibits district court injunctions against state rate orders under certain circumstances. But one of

the circumstances in which the Johnson Act does not bar injunction against a state rate order is where the order is found to be inconsistent with a federal statute or federal agency determination. *See* 28 U.S.C. § 1342(1); *New Orleans Pub. Serv., Inc. v. City of New Orleans*, 782 F.2d 1236, 1242 (5th Cir. 1986), *modified in part*, 798 F.2d 858, *cert. denied*, 481 U.S. 1023 (1987); *see also Aluminum Co. of America v. Utilities Comm'n*, 713 F.2d 1024, 1028 (4th Cir. 1983).

Connecticut Valley is making just such a FERC pre-emption argument in this case. Such a claim is not barred by the Johnson Act. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14 (1983); *New Orleans Pub. Serv.*, 782 F.2d at 1242. This is also true of Connecticut Valley's other claim on the merits – that the district court's earlier injunction against the Final Plan required the Commission to allow the increase; although we have found no case in point, it is unlikely that Congress intended that enforcement of a federal court injunction be barred by the Johnson Act.

The Commission's other threshold arguments are no more persuasive. Even if the modified Final Plan were itself too inchoate to make "ripe" a request to enjoin it – and we hold otherwise in our companion decision – the Commission's action in rejecting the Connecticut Valley rate increase is a formal agency rate action that has an immediate effect. *See generally Abbott Labs. v. Gardner*, 387 U.S. 136, 149-51 (1967). Of course, the possibility that it might be corrected by the Commission itself or by a state court might raise exhaustion concerns; but those are not very powerful in the face of a claim that the rejection violates FERC authority, and that it is going to cause immediate irreparable injury to the utility. *Cf. Bowen v.*

City of New York, 476 U.S. 467, 483-84 (1986); *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976).

The Commission also argues inventively that its December 31, 1997, order is akin to the so-called suspension orders by which federal agencies, under statutes authorizing this step, temporarily delay ("suspend") a carrier or utility increase rate while investigating it. *E.g.*, 16 U.S.C. § 824d(e). As a matter of federal administrative law, a refusal by the regulatory agency to suspend rates under these statutes is usually (but not always) deemed unreviewable because the order is an interim measure and the shipper or customer is usually made whole automatically if the rate increase is ultimately found unjustified.[2]

The present situation is in no way akin to these cases. Although the Commission's December 31, 1997, order did suspend the tariffs, it also made a formal determination to disallow the increase on the ground that it was imprudent for Connecticut Valley to continue its contract. *See* Order No. 22,815. This disallowance was *final* and is not akin to a mere suspension; the further investigation contemplated by the Commission's order was directed not to

---

[2] *See United States v. SCRAP*, 412 U.S. 669, 690-92 (1973); *Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658, 667 (1963); *see also Cities of Carlisle and Neola, Iowa v. FERC*, 704 F.2d 1259, 1262-63 (D.C.Cir. 1983) (reheard after FERC order became final, 741 F.2d 429). It is far from clear that the same doctrine automatically prohibits the carrier or utility from seeking review of an order that *does* suspend its rate increase tariff, although the agency's broad discretion in imposing this time-limited suspension would ordinarily defeat judicial review.

possible approval of the increase but to the possibility that a *further* reduction might be ordered.

In its last threshold objection, the Commission asserts that the district court erred in considering the utilities' request as a "related" case to be heard by the same judge considering the original action brought by PSNH. It is sufficient to say that the two matters involve a substantial overlap, amply qualifying for consolidation under the terms of Local Rule 42.1(a) & (c) of the New Hampshire District Court. This is so even though we ultimately conclude that the December 31, 1997, order is not to be treated as an implementation of the Final Plan.

We turn now to the merits, or, more precisely, the requirement that the party seeking injunctive relief show that it is likely to prevail on the merits. *See Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996). The first ground urged by the utilities in their brief is that the April 9, 1998, injunction is justified as an extension of the earlier injunctive relief secured by the PSNH against the Final Plan. The district court itself, at the April 3, 1998, hearing, described the Commission's December 31, 1997, order as an "end run" around the earlier injunction.

It is true that the Commission discussed the imprudence of the Connecticut Valley-Central Vermont contract in its order implementing the Final Plan; and both the December 31, 1997, order and the Final Plan reflect a common desire to hold down customer rates. Nevertheless, the disallowance of the specific increase does not purport to rest on the Final Plan and is expressed as an exercise of conventional cost-based rate regulation –

whether or not a lawful exercise is another matter. Thus, the injunction of April 9, 1997, requiring the rate increase, cannot be defended as enforcing the earlier injunction against the Final Plan.

What would support a preliminary injunction requiring the rate increase is a determination that the December 31, 1997, order would itself likely be found to violate the Federal Power Act or otherwise would contravene FERC's authority. The two utilities have argued forcefully that the December 31, 1997, order does violate federal law in two respects: by disregarding FERC's authority to determine what is a just and reasonable wholesale rate and by interfering with FERC's authority to impose a termination charge on Connecticut Valley.

The first of these two FERC-preemption arguments is expressed by the two utilities as a claim that the Commission has "violated the filed-rate doctrine" in its December 31, 1997, order rejecting the rate increase. The "filed rate" locution is commonly used in the case law (and in more than one way), but it is merely a shorthand as likely to confuse as to assist analysis.[3] Indeed, the label is somewhat misleading, since the doctrine on which the utilities here rely is not limited to rates.

---

[3] The phrase initially referred to the proposition that a shipper was bound to pay the tariff rate on file with the agency regardless of private understandings with the carrier, unless and until that rate was found to be unlawful. *See, e.g., Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939); *Pennsylvania R. Co. v. International Coal Co.*, 230 U.S. 184, 196-97 (1913). Only later was the phrase used by the Supreme Court, as it is used here by the utilities, to explain preemption of attempted state regulation.

Rather, the Supreme Court has ruled that where the FERC has lawfully determined a rate, allocation, or other matter, a state commission cannot take action that contradicts that federal determination. And even without explicit federal approval of a rate, the Court has treated a rate reflected in a FERC tariff as setting a rate level binding on a state commission in regulating the costs of the purchasing utility. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373-74 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-66 (1986); *cf. Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951).

The difficulty for Connecticut Valley is that the Commission did not disallow its retail rate increase on the ground that the wholesale rates charged by Central Vermont were unjust or unreasonable. Rather, the Commission found that it is imprudent for Connecticut Valley to continue purchasing from Central Vermont since lower cost sources of energy are allegedly available – even if Central Vermont's wholesale rate might be just and reasonable in the conventional (regulatory) sense that that rate merely covers Central Vermont's own acquisition costs.

The Supreme Court has never squarely decided the question of whether imprudence is an escape hatch from the Commission's otherwise existing obligation to respect FERC's authority to determine the just and reasonable rate. But the Court has twice said that it would assume *arguendo* that such escape hatch existed; the Third Circuit has so held; and FERC has concurred, citing prior cases of its own. *See Mississippi Power & Light*, 487 U.S. at 373-74; *Nantahala Power & Light*, 476 U.S. at 972; *Kentucky W. Va.*

Gas Co. v. Pennsylvania Pub. Util. Comm'n, 837 F.2d 600, 609 (3d Cir. 1988); *Palisades Generating Co.*, 48 FERC ¶ 61,144, at 61,574 and n. 10 (1989). We agree with FERC.[4]

Connecticut Valley says that the present situation is different because it is *required* to purchase from Central Vermont under a contract filed with FERC itself. It is arguable that the Commission could not disregard a long-term commitment by Connecticut Valley if FERC had blessed a contract that contained such a commitment, *cf. Mississippi Power & Light*, 487 U.S. at 373-74; *Nantahala Power & Light*, 476 U.S. at 972; but here the contract filed with FERC itself contains a provision allowing Connecticut Valley to extract itself on one year's notice.

In the district court, the utilities made an alternative argument for preemption, namely, that Central Vermont is seeking to impose some kind of an exit fee in proceedings before FERC, and the Commission's action in this case is trespassing on FERC's authority to impose such a fee. As noted, FERC has in fact indicated that it may

---

[4] In an amicus brief filed in this case, FERC in substance repeated the position that it took in an earlier order in Central Vermont Pub. Serv. Corp., Order Accepting Filing and Granting Request for Clarification, 84 F.E.R.C. ¶ 61,194, 1998 WL 765497 (F.E.R.C.), at *1 (Aug. 21, 1998), where it said: "We also clarify that the Commission's approval of the RS-2 rate schedule does not preclude the Public Utilities Commission of the State of New Hampshire (New Hampshire Commission) from determining whether Connecticut Valley acted imprudently by not terminating the rate schedule under its terms where lower-priced power was available to Connecticut Valley. In making this clarification, the Commission takes no position on whether Connecticut Valley had available other power supply choices, or whether Connecticut Valley acted imprudently."

entertain such a proposal, *see* 82 F.E.R.C. at ¶ 61,237, at 1998 WL 111732 (F.E.R.C.), at *1, and no doubt termination without an exit fee could leave Central Vermont customers to bear the full brunt of the higher cost power. But nothing in the state commission's December 31, 1997, order precludes FERC from imposing such a fee.

In sum, Connecticut Valley and Central Vermont have not shown likelihood of success on the merits, or even of fair ground for further litigation, in claiming that the December 31, 1997, order violates federal law insofar as it disallows the increase sought. That disallowance is the only issue on appeal in this case; if reductions of Connecticut Valley rates below existing levels are ordered, it will be time enough to consider whether they are precluded by the district court's injunction against the Final Plan or on other grounds.

If taken at face value, the claims of irreparable injury made by Connecticut Valley and Central Vermont are serious. The Commission's brief merely argues that Connecticut Valley had alternative means of relief – to appeal the Commission's orders to the state supreme court and to collect the higher rate pending appeal, subject to the filing of a bond. The utilities say that these options will not work. In all events irreparable injury is not itself a basis for injunction, absent some claim likely to succeed on the merits in the federal court action.

If we have misapprehended Connecticut Valley's arguments on the merits, it is free to petition for reconsideration; and a timely petition for reconsideration will stay the mandate – and thus maintain the April 12, 1998, injunction in effect until the petition is disposed of. Fed.

R.App. P. 41(a). However, if Connecticut Valley does face the kind of calamity it predicts, it would be wise to consider at once its alternative remedies at FERC or through discussion with the Commission.

Accordingly, the April 12, 1998, injunction is *vacated*. The Commission is entitled, once the mandate becomes effective, to require Connecticut Valley to reduce rates back to the level prevailing on December 31, 1997.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1629

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, ET AL.,
Plaintiffs, Appellees,

and

CONNECTICUT VALLEY ELECTRIC COMPANY and
CENTRAL VERMONT PUBLIC SERVICE CORPORATION,
Plaintiff/Intervenors, Appellees,

v.

DOUGLAS L. PATCH, CHAIRMAN OF THE
STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL.,
Defendants, Appellants.

JUDGMENT

Entered: December 3, 1998

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The injunction of the district court of April 12, 1998 is vacated in accordance with the opinion filed this day.

By The Court
PHOEBE MORSE
Clerk.

[cc: Messrs. Lane, Smith, McLaughlin, Freeman, Ms. Knowlton, Ms. Ross]

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 98-1629

Public Service Company of New Hampshire, et al.,
Plaintiffs-Appellees,

v.

Douglas Patch, et al.,
Defendants-Appellants.

Before

TORRUELLA, Chief Judge,
BOWNES, Senior Circuit Judge,
SELYA, BOUDIN, LIPEZ and REAVLEY*, Circuit Judges.

ORDER OF THE COURT

January 13, 1999

Upon consideration of motion,

Leave is granted Plaintiff-Appellees Connecticut Valley Electric Company and Central Vermont Public Service Corporation to File a Petition for Rehearing and Suggestion of Rehearing En Banc in Excess of Fifteen pages.

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having

---

*Of the Fifth Circuit, sitting by designation. Judge Stahl and Judge Lynch did not participate in this vote.

voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and suggestion of rehearing en banc, be denied.

By the Court:
Phoebe D. Morse, Clerk

By: Janice M. O'Neil
Chief Deputy Clerk

[cc: all counsel of record]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1629

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, ET AL.,
Plaintiffs, Appellees,

and

CONNECTICUT VALLEY ELECTRIC COMPANY and
CENTRAL VERMONT PUBLIC SERVICE CORPORATION,
Plaintiff/Intervenors, Appellees,

v.

DOUGLAS L. PATCH, CHAIRMAN OF THE
STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL.,
Defendants, Appellants.

Before
Boudin, *Circuit Judge*,
Bownes and Reavley,* *Senior Circuit Judges*.

ORDER OF THE COURT

Entered January 22, 1999

Plaintiffs-appellees Connecticut Valley Electric Company and Central Vermont Public Service Corporation have moved under Fed. R. App. P. 41(b) for a 30-day stay of mandate pending the filing of the petition for writ of *certiorari* with the United States Supreme Court. That request is denied. In our view, the likelihood of Supreme

---

*Of the Fifth Circuit, sitting by designation.

Court review at this time is at best limited, especially because the decision is directed to a preliminary injunction and because of the position of the Federal Energy Regulatory Commission as amicus curiae. Nevertheless, in light of the complexity of the legal issues and the detailed allegations of financial harm, a stay of mandate will be ordered to give plaintiffs-appellees sufficient time to seek a stay pending *certiorari* from the Circuit Justice.

Accordingly, the mandate in this case is temporarily stayed. If within 21 days of the date of this order an application for stay pending *certiorari* is filed by plaintiffs-appellees with the Circuit Justice, *see* Sup. Ct. R. 23, the stay of mandate in this court will continue until such time as the Circuit Justice grants or denies a stay pending *certiorari*. If an application for a stay is filed with the Circuit Justice within 21 days of the date of this order, counsel for plaintiffs-appellees shall notify the Clerk of this court; otherwise this court may terminate the present stay after 21 days without prior notice.

It is so ordered.

By the Court
Phoebe D. Morse, Clerk

By: Phoebe D. Morse
Chief Deputy Clerk

cc: All Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1764

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, ET AL.,
Plaintiffs, Appellees,

and

CONNECTICUT VALLEY ELECTRIC COMPANY
and CENTRAL VERMONT PUBLIC
SERVICE CORPORATION,

and

UNITIL CORPORATION, ET AL.,
Plaintiff/Intervenors, Appellees,

v.

DOUGLAS L. PATCH, CHAIRMAN OF THE
STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL.,
Defendants, Appellants.

JUDGMENT

Entered: December 3, 1998

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court
PHOEBE MORSE
Clerk.

[cc: Messrs. Lane, Smith, McLaughlin, Freeman, Mueller, Ms. Knowlton, Ms. Ross]

United States Court of Appeals
For the First Circuit

No. 98-1764

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE, ET AL.,

Plaintiffs, Appellees,

and

CONNECTICUT VALLEY ELECTRIC COMPANY
and CENTRAL VERMONT
PUBLIC SERVICE CORPORATION,

and

UNITIL CORPORATION, ET AL.,

Plaintiffs/Intervenors, Appellees,

v.

DOUGLAS PATCH, CHAIRMAN OF THE
STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION, ET AL.,

Defendants, Appellants.

APPEAL FROM THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Ronald R. Lagueux,* *U.S. District Judge*]

---

* Of the District of Rhode Island, sitting by designation.

Before

Boudin, *Circuit Judge*,

Bownes and Reavley,** *Senior Circuit Judges*.

Dennis Lane with whom *Michael E. Tucci* and *Morrison & Hecker, L.L.P.* were on brief for defendants Douglas L. Patch, Bruce B. Ellsworth and Susan S. Geiger.

Sarah B. Knowlton, Steven V. Camerino and *McLane, Graf, Raulerson & Middleton, P.A.* on brief for City of Claremont, New Hampshire, Amicus Curiae.

Douglas W. Smith, General Counsel, *John H. Conway*, Deputy Solicitor, and *Deborah B. Leahy* on brief for Federal Energy Regulatory Commission, Amicus Curiae.

Philip T. McLaughlin, Attorney General, *Martin P. Honigberg*, Senior Assistant Attorney General, Civil Bureau, *James K. Brown, John A. Shope* and *Foley, Hoag & Eliot LLP* on brief for Jeanne Shaheen, Governor of the State of New Hampshire, Amicus Curiae.

F. Anne Ross and *F. Anne Ross, P.C.* on brief for Retail Merchants Association of New Hampshire, New Hampshire Office of the Consumer Advocate, Campaign for Ratepayers Rights, Community Action Program, City of Manchester and Cabletron Systems, Inc., Amici Curiae.

** Of the Fifth Circuit, sitting by designation.

Lee A. Freeman, Jr., and *Allan B. Taylor* with whom *John F. Kinney, James T. Malysiak, Glynna W. Freeman, Freeman, Freeman & Salzman, P.C., Joseph M. Kraus*, Vice President and General Counsel, Central Vermont Public Service Corporation, *Dom S. D'Ambruoso, John T. Alexander, Ransmeier & Spellman, John B. Nolan, Allan B. Taylor, Gary M. Becker, Robert W. Clark* and *Day, Berry & Howard* were on brief for appellees Connecticut Valley Electric Company, Central Vermont Public Service Corporation, Public Service Company of New Hampshire, North Atlantic Energy Corporation, Northeast Utilities and Northeast Utilities Service Company.

Scott J. Mueller, Paul K. Connolly, Jr., Susan L. Geiser, Erica Tarpey and *Leboeuf, Lamb, Greene & MacRae* on brief for appellees Concord Electric Company, Exeter & Hampton Electric Company, Unitil Power Corp., and Unitil Corporation.

December 3, 1998

BOUDIN, *Circuit Judge*. The question presented on this appeal is whether a state plan deregulating the electric utility industry in New Hampshire was properly enjoined by the district court pending trial on the merits. The injunction was originally obtained by Public Service Company of New Hampshire ("PSNH") but was later extended to protect the other electric utilities in New Hampshire. A separate question, decided today in a companion decision in No. 98-1629, is whether the district

court erred in granting specific relief to Connecticut Valley Electric Service Company ("Connecticut Valley"), arguably going beyond the injunction against the plan.[1]

I. BACKGROUND

PSNH is the largest electric utility in New Hampshire and supplies about 70 percent of the retail electric power in the state. During the 1970s, PSNH began construction of a nuclear generating plant in Seabrook, New Hampshire. Delays and cost overruns at Seabrook were so extensive that in 1988 PSNH was forced to file for bankruptcy protection in New Hampshire. It appears that a state statute, passed to prevent recovery through rates of Seabrook's construction-in-progress costs, contributed to the debacle.

The State of New Hampshire intervened in the bankruptcy proceedings and ultimately a deal was hammered out. A major out-of-state utility – Northeast Utilities – agreed to acquire all of PSNH's stock and, through a corporate affiliate (North Atlantic Energy Corporation), it also took over Seabrook. The price paid, for the benefit of PSNH's creditors and stockholders, was $2.3 billion. As part of the transaction, the State of New Hampshire executed a rate agreement in November 1989 to permit Northeast Utilities to recover its full investment.

---

[1] Both this case and No. 98-1629 bear the same caption because both arise out of the same district court docket; but the two cases involve separate appeals from separate injunctions entered by the district court.

At the time, electric utilities in New Hampshire were subject to traditional utility rate regulation – here, by the New Hampshire Public Utility Commission (the "Commission") – through which retail rates are set to permit a utility to recover its prudently incurred costs, including a return on prudent investment in the facilities used to provide service. The rate agreement secured by Northeast Utilities contained formulas for allocating the recovery of the investment (including Seabrook) so that the impact on retail rates would be spread out over time.

The bankruptcy court approved the reorganization plan, including the rate agreement, *In Re Public Serv. Co.*, 114 B.R. 820, 843 (Bankr. D.N.H. 1990), which we affirmed on appeal, *In re Public Serv. Co. v. Northeast Util. Serv. Group*, 963 F.2d 469 (1st Cir. 1992). The New Hampshire legislature authorized the Commission to review the rate agreement, N.H. Rev. Stat. Ann. § 362-C (1995), and the Commission approved the rate agreement. *In Re Northeast Utils./Public Serv. Co.*, 114 P.U.R.4th 385 (N.H.P.U.C. 1990). The New Hampshire Supreme Court upheld the approval. *Appeal of Richards*, 590 A.2d 586 (N.H. 1991).

The rate agreement assured PSNH of annual 5.5 percent electric rate increases for a seven year period (now completed); and it provided that PSNH could buy Seabrook-generated power at prices sufficient to recover Seabrook costs. Partly for these reasons, New Hampshire electric rates rose sharply. In response, the New Hampshire legislature in 1996 adopted the Electric Utility Restructuring Act, N.H. Rev. Stat. Ann. §§ 374-F:1, *et seq.* (Supp. 1997), providing for the introduction of competition into the electric utility industry in New Hampshire.

Under this statute, the Commission conducted hearings and on February 28, 1997, it issued a restructuring plan (the "Final Plan" or "Plan") and a set of implementing orders. *See* Order No. 22,514 (adopting general statewide Final Plan and Legal Analysis); *see also* Orders No. 22,509-22,513 (specific utilities' interim stranded cost rulings). The Plan is extremely complicated in its details but a brief summary of pertinent elements will suffice for the present.

First, the Plan provides that in several years all New Hampshire electric utilities will be required to separate ("unbundle") their local distribution and transmission facilities from their generation facilities, divest the latter and permit use of their distribution facilities to carry – for a distribution charge – electricity generated by other suppliers. In effect, customers could then choose the source of their electrical power, the market would set prices through competition, and the Commission would merely set distribution charges (primarily based on cost) for the use of the distribution networks (which remain effective monopolies).[2]

---

[2] It may be helpful, even though an oversimplification, to think of distribution as the network within the town or city (*e.g.*, poles and wires) and transmission as the intercity network (*e.g.*, high voltage lines and towers). The thrust of the state plan in this respect is to open up each distribution network to multiple energy suppliers and regulate the charge for such use. Federal authorities already regulate such carriage of another supplier's power (called "wheeling") over transmission networks. *See* 16 U.S.C. §§ 824j-824k; FERC Order No. 888, 61 Fed.Reg. 21540 (1996) (to be codified at 18 C.F.R. pts. 35 & 385).

Second, during a phase-in period before unbundling and competition among suppliers for customers, the Commission proposed to continue to set retail rates for electricity supplied to customers by the existing utilities. However, it would also force prices down to market levels determined by average regional rates, with a possible upward adjustment of up to eight percent over cost as determined by the Commission. This period was to last two years (originally starting January 1, 1998) beginning at the implementation of utilities' compliance filings, after which the unbundling and competition would occur.

Third, recognizing that market-based rates would likely not permit the utilities to recover all of their investment in existing plant, the Commission provided for recovery of so-called "stranded investment" both in the interim phase (through the adjustment of up to eight percent) and in the final phase (by allowing an increment to the distribution charge over and above actual cost). How much of the stranded investment would ultimately be recovered through these mechanisms is a matter of substantial dispute and depends in some measure on decisions yet to be made by the Commission.

In sum, the Commission's Final Plan proposed to end the existing regime in which the agency set retail rates for electric power in New Hampshire based on cost. Operating in two phases, the new regime, mixing elements of competition and regulation, pressed toward market rates for retail power. The utilities' ability to recover their prudent investment in distribution, transmission and generation facilities was, at the very least, cast in doubt.

This is so because even where the investment was originally prudent, full competition can easily make some of that investment unrecoverable.[3]

On March 3, 1997, immediately after the Final Plan was adopted, PSNH filed a 13-count complaint in federal district court and requested a temporary restraining order against implementation of the Plan. PSNH argued that the Plan was preempted by specific provisions of the Federal Power Act, 16 U.S.C. §§ 791a to 825r, under which the Federal Energy Regulatory Commission ("FERC") regulates utilities;[4] the Public Utilities Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 15 and 16 U.S.C.); and the Public Utility Holding Company Act, 15 U.S.C. §§ 79 to 79z-6. PSNH also argued that the Plan constituted an

---

[3] Any long-term commitment, even if reasonable, involves risk (*e.g.*, where new generation technology proves cheaper than old or where spot electric prices are less than long-term contract rates). Absent competition, investment normally is recovered through charges to customers who have no alternative source of supply. Where rates are forced down to market levels, whether by actual competition or by proxy, no such protection exists.

[4] FERC regulates wholesale rates for interstate sales of electricity and the contracts for such sales; why this includes PSNH's wholesale purchases from Seabrook is not explained but is also not disputed by the Commission. *See* 16 U.S.C. § 824 (1994). Northeast Utilities filed the Seabrook power contract with FERC pursuant to the Federal Power Act, 16 U.S.C. § 824d, which modified its rate structure *sua sponte*. *See Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 943 (1st Cir. 1993), *aff'd after remand*, 55 F.3d 686, 693 (1st Cir. 1995).

unconstitutional taking and violated substantive due process, the Contracts Clause, the Commerce Clause, and the First Amendment.

In support of its TRO request, PSNH submitted affidavits including those of experts explaining that the adoption of the Final Plan, unless enjoined, would force PSNH under established accounting standards to write-off more than $400 million in investment, effectively repudiating the November 1989 rate agreement between New Hampshire and Northeast Utilities. In turn, the write-off and the alleged repudiation would place the company in default under a number of loan and credit agreements, prompting creditors to accelerate the collection of over $1 billion in debt and forcing PSNH into bankruptcy.

On March 10, 1997, the district court held a hearing on the TRO request at which both sides presented oral argument; the Commission presented no counter-affidavits. Persuaded that there was a substantial threat to PSNH, the district court issued a TRO against the Commission's Orders No. 22,512 (the Final Plan) and 22,514 (the implementing order as to PSNH) pending a hearing on whether a preliminary injunction would issue. The TRO stayed Orders No. 22,512 and 22,514 only as they affected PSNH, but under the state's statute, no utility is required to implement its compliance filing until compliance filings representing at least 70 percent of retail electric sales – effectively, those covering PSNH – are being implemented. *See* N.H. Rev. Stat. Ann. § 374-F:4(IV) (1997).

On March 20, 1997, the district court held an evidentiary hearing. PSNH presented four witnesses: the chief financial officer of Northeast Utilities, a vice-president of Northeast Utilities, a senior partner at an independent accounting firm, and an investment banker. They testified that adoption of the Plan, which abandons the traditional cost-recovery regime for regulating utility rates, would under established accounting standards cause write-offs, trigger loan covenant defaults, prompt accelerated debt collection, and force PSNH into bankruptcy. Commission lawyers cross-examined PSNH's experts but presented no opposing witnesses.

On March 21, 1997, the court renewed the TRO in somewhat revised language and asked for briefing on ripeness and abstention objections offered by the Commission. On April 28, 1997, the district court rejected those defenses in *Public Serv. Co. v. Patch*, 962 F. Supp. 222 (D.N.H. 1997) (*"Patch I"*), and rejected a Commission claim that the court lacked jurisdiction under the Johnson Act, 28 U.S.C. § 1342. The court said that its March 21, 1997, amended TRO would remain in effect pending further order by the district court.

In May 1997, further proceedings in the district court were stayed by agreement of the parties so that mediation could be attempted; the attempt failed and the stay was ultimately dissolved in September 1998 [sic]. However, the district court took no further action on the injunction proceedings until early 1998 while awaiting the outcome of two related proceedings, in other forums, that might affect the decision whether to maintain injunctive relief.

One was an appeal to this court by certain ratepayer and other interests whose intervention motions had been rejected by the district court in June 1997. *Public Serv. Co. v. Patch*, 173 F.R.D. 17 (D.N.H. 1997) (*"Patch II"*). On this appeal, these parties sought to raise abstention and related objections that could prove dispositive. In February 1998, this court sustained the district court's denial of intervention and refused to reach the abstention issues. *Public Serv. Co. v. Patch*, 136 F.3d 197 (1st Cir. 1998) (*"Patch III"*).

The other intervening event was the Commission's receipt of petitions for reconsideration of its Final Plan and related implementing orders. These requests, filed in Spring 1997, raised the possibility that the Commission might significantly alter the Final Plan; in fact, the Commission stayed portions of the Plan and implementing orders pending reevaluation (Order No. 22,548) and deferred ruling on the requests until March 1998. In this interim, there is some indication that the Commission was negotiating privately, at least with PSNH, in an effort to reach an accommodation.

During this hiatus in the PSNH litigation, a different controversy developed in late 1997, primarily between the Commission and another New Hampshire electric utility, Connecticut Valley Electric Service Company. The district court, having allowed the other New Hampshire electric utilities to intervene in PSNH's injunction action, considered in that court docket all requests by other utilities for related relief. As we will see, the new controversy with Connecticut Valley became a springboard for expanding injunctive relief to protect all of the utilities against the Final Plan.

On March 20, 1998, the Commission finally entered a new order, Order No. 22,875, that modified the 1997 Final Plan and resolved petitions for rehearing on company-specific implementing orders. The Commission deleted certain features of its Final Plan that had made the Plan especially vulnerable to attack on grounds of federal preemption.[5] In addition, the Commission cryptically announced that it would permit PSNH to have cost recovery – of a kind not clearly specified – in the course of further proceedings. Thereafter PSNH filed a further amended complaint in district court renewing most of the same claims it had earlier made.

On April 3, 1998, the district court held a hearing (one of several described at length in our companion opinion) directed primarily to relief sought by Connecticut Valley. In the course of that hearing, the district court expressed the view that its earlier March 21, 1997, order obtained by PSNH had contemplated that the Commission's Final Plan would not be implemented *pendente lite* against any of the utilities. On April 9, 1998, the court entered a written amended preliminary injunction enjoining the Commission pending further court proceedings from requiring any New Hampshire utility to obey the Final Plan or to submit to orders designed to implement that plan.

---

[5] The original Final Plan had required the utilities to submit FERC-regulated transmission rates (*see* note 2, above) with the Commission before they were filed with FERC, and it required divestiture of generating operations, arguably affecting the structure of utilities regulated under the Public Utility Holding Company Act. These requirements were dropped on reconsideration.

Incident to the April 1998 court proceedings, the district court directed all parties to prepare for trial on the request for a permanent injunction now supported by other utilities as well as PSNH. Although PSNH said that it was ready for trial immediately, the Commission requested six months for discovery and the district court ruled that discovery would close in October 1998, with a trial on the request for a permanent injunction toward the end of November 1998. That date has recently been extended until February 1999 to permit more discovery.

At the time of the April 1998 proceedings in the district court, the Commission's new Order No. 22,875 modifying the original Final Plan and implementing orders had only recently been issued, but the district court had declined to address it immediately. Instead, on June 5, 1998, the district court held a further hearing to consider among other things the extension of the preliminary injunction to embrace the modified Final Plan order as well. On June 12, 1998, the district court issued an order enjoining the implementation of Order No. 22,875.

The Commission then appealed to this court. In No. 98-1764, the Commission appeals from the June 12, 1998, order of the district court enjoining the Commission from requiring any utility to comply with the modified Final Plan or implementing orders; and in No. 98-1629, the Commission appeals separately from the district court's order of April 9, 1998, using that appeal as a vehicle to address its separate dispute with Connecticut Valley. Both orders are effectively preliminary injunctions subject to immediate appeal. 28 U.S.C. § 1292(a) (1994). In this decision, we are concerned with review of the June 12, 1998, order.

On appellate review of the grant or denial of a preliminary injunction, the deferential standard of "abuse of discretion" applies to judgment calls, by the district court, such as those that involve the weighing of competing considerations. *See K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989). Abstract issues of law are subject to review *de novo* and findings of basic fact to the clear error standard. *See Ocean Spray Cranberries, Inc. v. PepsiCo, Inc.*, No. 96-1948, 1998 WL 777475 (1st Cir. Nov. 12, 1998) at *14 & n.1.

II. THRESHOLD ISSUES

Each side has raised threshold objections, the Commission to the district court's consideration of the complaint and PSNH to the Commission's appeal to this court. Since the latter effectively disputes our authority to consider the former as well as the merits of the injunction, we address first PSNH's twofold claim: that the notice of appeal is defective and that in any event the June 12, 1998, preliminary injunction is not an appealable order as to PSNH.

The first objection turns on the fact that the Commission's notice of appeal named the Commission and no one else as the appellant, while the named defendants in the district court were the individual commissioners and not the Commission, presumably because of Eleventh Amendment concerns. This discrepancy leads PSNH to say that the appeal is not taken by anyone who was a party in the district court and is therefore ineffective.

Needless to say, there is no actual confusion as to the commissioners' intent to appeal or any suggestion of

unfairness. The complaint challenged the commissioners for official acts; it even referred to them by way of shorthand as "the Commission." The individual commissioners appear in the caption of the notice of appeal. Under these circumstances, we think that the appeal should have been understood by everyone as that of the original defendants, the individual commissioners. Fed. R. App. P. 3(c) & advisory committee notes to 1993 amendment.

The other objection has slightly more substance but not enough to persuade. PSNH points out that the Commission did not seek to appeal from the March 21, 1997, order which was effectively an appealable preliminary injunction, having occurred after a hearing and without the 10-day limit applied to TROs. *See* Fed. R. Civ. P. 65(b). PSNH argues that at least as to it, the preliminary injunction of June 12, 1998, did no more than maintain the relief granted earlier. PSNH then argues that, because the latter added nothing to the former, the Commission is circumventing the time limit on the original appeal which was 30 days. *See* Fed. R. App. P. 4(a)(1).

Even though the statute says that appeal may be taken from the "continuat[ion]" of an injunction, 28 U.S.C. § 1292(a)(1), PSNH's argument might have some force in some circumstances. *See Sierra Club v. Marsh*, 907 F.2d 210, 212-14 (1st Cir. 1990). However, here the June 12, 1998, injunction extended injunctive relief – to PSNH quite as much as other utilities – to include the modified Final Plan – whereas earlier orders had addressed only the original Final Plan. Thus, the new injunction was not merely an echo of the old and is independently appealable and properly before us. *Cf. Gon v. First State Ins. Co.*, 871 F.2d 863, 866 (9th Cir. 1989).

Opposing PSNH, the Commission and amicus interests that support it[6] have advanced three reasons why the district court should not even have considered the request for preliminary injunction: alleged lack of ripeness, various of the so-called abstention doctrines established by the Supreme Court, and the Johnson Act's express restriction on district court injunctions against state rate orders under certain circumstances. The district court addressed these objections at length in *Patch I*, 962 F. Supp. at 230-44. Presented as objections to an appealable preliminary injunction, these objections are now properly before us. *Compare Patch III*, 136 F.3d at 210.

We begin with the ripeness question, which essentially asks whether a case is premature. Two aspects of prematurity especially concern the courts: one is whether the threat of injury is sufficiently immediate, and the other is whether the issues raised can properly be decided in the abstract or would benefit from facts not yet known (*e.g.*, where validity of the statute might depend upon the circumstances in which it is applied). *See* Chemerinsky, *Federal Jurisdiction* § 2.4 at 98, 101-109 (1989).

In its famous *Abbott* trilogy, *see Abbott Labs. v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967), the Supreme Court said that ripeness depends upon the "fitness" of the issues for immediate review and

---

[6] The amici supporting the Commission are the Governor of New Hampshire, represented by the New Hampshire Attorney General, and a collection of interests headed by the Retail Merchants Association of New Hampshire.

the "hardship" to the litigant in postponing judicial intervention. *See Abbott Labs.*, 387 U.S. at 149. Fitness and hardship involve matters of degree, but there is no need to plumb the subject, since lack of ripeness is the least plausible of the objections to the injunction in this case.

With regard to fitness for review, the Commission's Final Plan adopted a specific and detailed structure for utility deregulation and ratemaking in New Hampshire. By the time of the modified preliminary injunction issued on June 12, 1998, the Commission had also disposed of requests for reconsideration. Further, the Commission issued a set of implementing orders, effectively one to each utility. These orders requested steps to be taken, including the establishment of market-proxy retail rates, the filing of information to calculate local distribution rates for the next phase, and ultimately the institution of local distribution tariffs to permit wheeling and the corporate separation of distribution from generation.

As for the other consideration under *Abbott*, hardship if review is deferred, the affidavits submitted by PSNH assert (with considerable supporting detail) that the adoption of the Final Plan and implementing order would, unless enjoined, lead almost immediately to a change in PSNH's status under accounting rules, place the company in default as to various lines of credit, and push it rapidly down the slope to near-term bankruptcy. Of course, the adequacy of this showing can be disputed, but the Commission has thus far made little effort to do so.

The amici brief of Retail Merchants Association of New Hampshire, et al., is the strongest proponent of the

ripeness objection. It argues that review is premature because the New Hampshire Supreme Court is considering rulings requested by the Commission relating primarily to the Contracts Clause argument,[7] and because the Commission has not yet made a final determination as to the precise amounts that PSNH may recover as stranded costs, a matter that is still the subject of ongoing proceedings.

The pending state court proceeding does not render the present case unripe. Even if we focus only on the Contracts Clause claim – most of PSNH's claims concern other matters – the state court's view of the agreement would not necessarily resolve the federal constitutional issue, *cf. Rhode Island Laborers' Dist. Council v. Rhode Island*, 145 F.3d 42, 43 (1st Cir. 1998), even if that view were adverse to PSNH. And while a ruling adverse to the Commission might lead to modification of the existing plan, the fact remains that the existing plan threatens imminent harm, assuming the truth of PSNH's affidavits is accepted.

The more difficult question is whether ongoing Commission proceedings may refine the Commission's stranded cost formulas in ways that diminish the impact of its Final Plan and implementing orders on PSNH. In

---

[7] The Commission has asked the New Hampshire Supreme Court to consider, along with certain related issues, whether the rate agreement entered into incident to the Seabrook reorganization constitutes a binding contract. *See In re New Hampshire Public Utilities Commission v. Statewide Electric Utility Restructuring Plan*, No. 98-114 (N.H. 1998). No decision has yet been issued.

our view, the Commission's new but cryptic suggestion of some kind of cost recovery for PSNH (already noted) is too slim a basis for postponing review. The modified Final Plan itself is claimed by PSNH to inflict irreparable harm and, if the new suggestion has altered matters, the Commission can raise the issue in the district court in connection with the permanent injunction.

The second threshold objection is that the district court should have refused the injunction on abstention grounds. Abstention is not one doctrine but several, and the strand that most invites attention derives from *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The fundamental concern in *Burford* is to prevent federal courts from bypassing a state administrative scheme and resolving issues of state law and policy that are committed in the first instance to expert administrative resolution. *See New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 361-64 (1989); *Bath Mem. Hosp. v. Maine Health Care Fin. Comm'n*, 853 F.2d 1007, 1014-15 (1st Cir. 1988) (Breyer, J.).

But *Burford* abstention does not bar federal court injunctions against state administrative orders where there are predominating federal issues that do not require resolution of doubtful questions of local law and policy. *See New Orleans Pub. Serv.*, 491 U.S. at 362; *Bath*, 853 F.2d at 1013. In such cases, *Burford* abstention is not required merely because the federal action may impair or even entirely enjoin the operation of the state scheme. *See Zablocki v. Redhail*, 434 U.S. 374, 379 n.5 (1978); *see also New Orleans Pub. Serv.*, 491 U.S. at 361-64; *Bath*, 853 F.2d at 1014-15.

Thus focused, the *Burford* doctrine has no application to most of the claims advanced by PSNH. It does not require looking beyond "the four corners" of the Final Plan, *New Orleans Pub. Serv.*, 491 U.S. at 363, to confirm that the Final Plan is intended to shift from cost-based regulation to market-driven rates for electricity. To the extent that such a shift in regime is itself claimed to violate the Contracts Clause, or interfere with FERC's preemptive authority or contravene orders of the Seabrook bankruptcy court, *Burford* abstention is not even arguable.

The amici, but not the Commission, rely on a second (and older) abstention doctrine associated with *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941). Under *Pullman*, abstention may be warranted where state court resolution of an issue of state law might avoid a federal constitutional issue. *Pullman*, 312 U.S. at 500-01. *Pullman* abstention calls for deferral of a case rather than dismissal and may be a matter of discretion. *See* Chemerinsky, § 12.2.1, at 595, 603.

Here, it is true that proceedings in the New Hampshire Supreme Court (*see* note 7 above) could conceivably increase PSNH's cost recovery and affect its Contracts Clause and confiscation claims. But the timing, outcome and consequences of the state-court proceedings are uncertain, and PSNH is faced with an existing modified Final Plan that will, if PSNH's affidavits are believed, drive it shortly into bankruptcy (absent the injunction). This is not the kind of case for which the *Pullman* doctrine is designed. *See United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356, 362-63 (3d Cir. 1986).

The last threshold barrier, relied on by the Commission and both amici, is the Johnson Act, 28 U.S.C. § 1342 (1994), providing that if each of four conditions is met, the district court "shall not enjoin" the operation of, or compliance with, "any order effecting rates chargeable by a public utility and made by a State administrative agency. . . . " The Johnson Act operates only where each of the following conditions is met:

> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State. *Id.*

The modified Final Plan and the implementing orders are orders affecting rates within the meaning of the Johnson Act, *compare Tennyson v. Gas Serv. Co.*, 506 F.2d 1135, 1140 (10th Cir. 1974), *with Public Util. Comm'n v. United States*, 355 U.S. 534, 540 (1958); and the utilities do not directly deny that the third and fourth conditions are met. Instead, they argue that jurisdiction in this case is not based "solely on diversity of citizenship or repugnance of the order to the Federal Constitution" and that the orders "interfere with interstate commerce."

The Johnson Act was prompted by concerns akin to those that later gave rise to *Burford* abstention, *see Alabama Pub. Serv. Comm'n v. Southern R. Co.*, 341 U.S. 341,

357-58 (1951) (Frankfurter, J., concurring), but the Johnson Act has a narrower reach and that reach is more rigidly defined. The statute does not apply to claims based upon a congressional statute or federal administrative rulings, even though these commands are ultimately backed up by the Supremacy Clause (and are therefore arguably "constitutional" claims). The case law on this point is so clear cut that no further discussion of the point is required.[8]

Several of PSNH's more important claims are based on federal statutes, federal administrative rulings or both and are therefore not barred by the Johnson Act. PSNH's claims based directly on the Constitution are less secure. The literal language of the Johnson Act leaves some room to argue that the constitutional claims would also support relief simply because jurisdiction over the case would not have been based "solely" on diversity or constitutional grounds. But the statute's evident purpose is to bar injunctions based on constitutional violations regardless of other claims in the complaint.

If the district court finds that a permanent injunction is supported only by constitutional claims, it may have to decide this arguable conflict between language and purpose. While we are doubtful that the statute permits relief

---

[8] *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *New Orleans Pub. Serv., Inc. v. New Orleans*, 782 F.2d 1236, 1242 (5th Cir. 1986), *modified in part*, 798 F.2d 858, *cert. denied*, 481 U.S. 1023 (1987); *see also Aluminum Co. of America v. Utilities Comm'n*, 713 F.2d 1024, 1028 (4th Cir. 1983); *International Bhd. of Elec. Workers v. Public Serv. Comm'n*, 614 F.2d 206, 209-11 (9th Cir. 1980).

based on constitutional claims, even though other claims may support jurisdiction, the issue has not been adequately briefed, and we will not decide it. Of course, even a constitutional claim alone would permit relief if the state action "interfere[s] with interstate commerce." 28 U.S.C. § 1342(2); *see also Public Util. Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 469-70 (1943); *Tri-State Generation & Transmission Ass'n, Inc. v. Public Serv. Comm'n*, 412 F.2d 115, 118-19 (10th Cir. 1969).

III. THE MERITS

Once past the threshold issues, we reach the familiar four-part test for preliminary injunctions and the question whether preliminary injunction in this case is justified. The usual requirements are (1) that the moving party show a likelihood of success on the merits, (2) that irreparable injury be demonstrated in the absence of an injunction; and (3) and (4) that injunctive relief be found to be consistent with the equities and the public interest. *See Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996).

In the ordinary case where a preliminary injunction is granted, the district court usually sets forth its reasons for believing that a likelihood of success has been shown on one or more claims, and opposing party tries to show on appeal why this assessment is flawed or mistaken. In this case, the district court's assessment of the merits was foreshortened and the Commission's brief on appeal does not seriously address the merits of PSNH's claims. This is a formidable handicap to an intelligent discussion of the merits.

The reasons why there is no full-scale appraisal of the merits by the district court are severalfold. The original TRO request was accompanied by a reasonably extensive memorandum by PSNH laying out its theories for asserting that the Final Plan and implementing orders were unlawful, and by extensive affidavits attempting to show irreparable injury of the most severe kind was imminent. In opposing the TRO, the Commission concentrated primarily on disputing claims of irreparable injury and at later stages, it pressed the abstention and other threshold claims already discussed. Possibly, it hoped to postpone a preliminary ruling on the merits while making modifications in the Final Plan that might strengthen the Commission's hand.

Whatever the cause of this tactic, it led the district court to eschew any formal or detailed discussion of PSNH's likelihood of success on the merits akin to the court's thorough discussion of the threshold issues such as abstention. Still, this is not a case where the district court ignored likelihood of success: a review of the transcript shows that the district court did consider likelihood of success, that it was especially impressed with PSNH's Contracts Clause claim and that it thought that certain of the FERC preemption claims were substantial.

On appeal, the Commission now does seek to dispute PSNH's likelihood of success assertions; the Commission argues first and most elaborately that "plaintiffs are unlikely to prevail on the merits." This court might be justified in passing by the argument on the ground that it was not adequately developed below, *see MCI Telecomm. Corp. v. Matrix Communications Corp.*, 135 F.3d 27, 32 (1st Cir.), *cert. denied*, 118 S. Ct. 2370 (1998), but we address it

for several reasons: some of the substance was presented to the district court, the argument is essentially legal rather than factual so lack of district court development is not a handicap, and the impact of the injunction on a regulatory regime affecting the public interest weighs heavily with us.

Yet the Commission's main "merits" argument is almost entirely beside the point. The Commission lays out and supports with citations the proposition that states have substantial latitude in determining rate methodologies, that cost-of-service rate making is not infallible, that unreasonably high rates may be restrained, that constitutional considerations normally take account of multiple interests, and that the Final Plan embodies a regime that is generally reasonable and capable of adjusting to individual circumstances. Most of what the Commission says is plausible in the abstract.

The manifest difficulty is that these arguments respond to none of the specific claims made by PSNH. There is no adequate discussion of the PSNH Contracts Clause claim or the related argument that New Hampshire agreed in the bankruptcy proceeding to allow full recovery of the Seabrook investment. The Commission meets PSNH's claims that the Final Plan invades FERC jurisdiction or conflicts with FERC orders only by responding (in another section of its brief) that the modifications produced by its order on reconsideration have "mooted" the issue; however, the argument made in this section addresses only one of PSNH's several FERC-preemption arguments.

The Retail Merchants' amicus brief makes a somewhat more detailed argument under a heading concerning "likelihood of success." But this is actually a claim that PSNH's takings argument is premature, as the Commission may or will allow some of the disputed costs to be recovered; we have already addressed this concern in connection with the ripeness issue. The amicus brief submitted by New Hampshire's Governor also discusses the merits, but the only detailed argument is limited to claims that there is no conflict between the Commission's modified Final Plan and FERC orders or authority. The FERC claims are only some of the many claims put forth by PSNH.

Nevertheless, we have considered whether at least one or more of the claims put forth by PSNH provides fair grounds for further litigation – this lesser standard being defensible in light of the rather powerful showing of irreparable injury made by PSNH. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977). This standard is met by PSNH's argument that New Hampshire effectively promised in the rate agreement incident to the bankruptcy reorganization that PSNH or one of its affiliates would be allowed to recover through PSNH retail rates a specific investment of $2.3 billion; that the switch to a market-based rate regime effectively nullifies this promise; and that the promise is enforceable under Contracts Clause jurisprudence.

The state's involvement in the rate agreement, already described, certainly makes a Contracts Clause claim plausible, even if closer examination might defeat the claim or provide the state a loophole. *See McGrath v.*

Rhode Island Retirement Bd., 88 F.3d 12, 16 (1st Cir. 1996). Of course, the Johnson Act may well preclude an injunction based solely on constitutional grounds, as we discussed above. But PSNH makes a similar argument that disregard of the bankruptcy agreement conflicts with the bankruptcy court's disposition of the Seabrook reorganization; if this version has merit, the Johnson Act would not be a bar.

In any case, claims based on FERC preemption are not subject to the Johnson Act, and several such arguments pressed by PSNH appear to be substantial. One concern may have been resolved by the modification order (eliminating obligatory filing of FERC transmission tariffs with the Commission), and another argument (whether the state has authority to order wheeling over local distribution lines) might not – even if sound – affect the initial decision to force retail rates toward market levels without actual competition.

However, PSNH's most far-reaching argument under the Federal Power Act appears to be that the rate reductions contemplated by the Commission would prevent full recovery by PSNH of the cost of power that it is required to buy from Seabrook by long-term contract made in connection with the bankruptcy reorganization. Under established doctrine, discussed at greater length in our companion opinion, state agencies have limited ability to disallow the cost of electricity supplied at rates contained in tariffs filed with FERC.[9] In shorthand, the

---

[9] *See, e.g., Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373-74 (1988); *Nantahala Power & Light Co. v.*

rate in a tariff filed with FERC is the binding rate unless and until FERC alters it.

It is true that a state agency may be able to disallow the cost of power purchases to the extent that they are imprudent,[10] unless those purchases are required by a federal mandate. *See Mississippi Power & Light*, 487 U.S. at 373-74; *Nantahala*, 476 U.S. at 965. But even if FERC's approval of the PSNH-Seabrook contract does not create such a mandate – a point neither side has discussed – the Commission does not claim that the contract entered into as part of the state-endorsed reorganization was imprudent. And, unlike the Connecticut Valley contract discussed in the companion case, the PSNH-Seabrook contract is not said to contain a clause permitting termination on short notice.

We thus conclude that PSNH has a sufficient claim on the merits to permit a preliminary injunction. As to the remaining three conditions, they can all be discussed together, because the starting point for each is PSNH's claim that without the injunction it would be driven rapidly into bankruptcy. This is not only an extreme form of irreparable injury but, if the threat is a real one, would give PSNH a powerful equitable argument. As for the

---

Thornburg, 476 U.S. 953, 965 (1986); *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577-79 (1981); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951).

[10] *See, e.g., Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 609 (3d Cir. 1988); *Pike County Light & Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735, 737-38 (Pa. Commw. 1983); *see also Appeal of Sinclair Mach. Prods., Inc.*, 498 A.2d 696, 703-04 (N.H. 1985).

public interest, lower rates are always an attraction, but New Hampshire itself has avowed that a second PSNH bankruptcy would not be in the public interest.

The question whether PSNH made a showing of threatened bankruptcy is easy to answer in the affirmative. It presented extensive affidavits and then live witnesses, whereas the state did no more than to seek to cross-examine. Nothing in the examination persuades us that the district court committed clear error in finding the threat to be real. Neither the Commission nor the amici in their appeals briefs seek to discuss in detail PSNH's evidence of irreparable injury.

The Commission and amici say that the Commission's orders leave some room for further adjustments that would increase the ability of PSNH to recover more of its investment. Yet PSNH's witnesses said that bankruptcy would flow simply from the Commission's decision to impose on it a rate regime designed to lead to market-based rates. And far from providing assurance that the Northeast Utilities' investment will be recovered, the briefs of the Commission contain disquieting references to the recovery of *prudent* investment.[11]

---

[11] Possibly the original Seabrook plant was imprudent, but Northeast Utilities paid the $2.3 billion for PSNH assets including its Seabrook interest because of Northeast Utilities' understanding that it would be allowed to recover the amount that it was paying. New Hampshire benefitted by bringing the bankruptcy to a satisfactory end, avoiding the risk of even steeper rate increases.

We thus conclude on the present record that the district court was entitled to issue a preliminary injunction in favor of PSNH. None of the pillars on which this conclusion rests is immune to reexamination in connection with a permanent injunction or, at any other time, if there are new developments to warrant a further look. And what has been said so far about the merits and irreparable injury pertains to the injunction so far as it restrains the Commission from applying the Final Plan and implementing orders *to PSNH*.

The district court's extension of the injunction to protect all other New Hampshire electric utilities is more troublesome. Although the other utilities have joined in attacks on the Final Plan similar to those made by PSNH, it is not clear that they can assert the Contracts Clause or bankruptcy reorganization arguments that made PSNH's case so appealing to the district court. Nor is it evident that utilities are constitutionally insulated against losses that result merely from a change in rate regulation that introduces competition.[12]

Curiously, the Commission itself has not sought to distinguish the claims of the other utilities from those of PSNH by arguing that even if the injunction was properly granted in favor of PSNH, it is inadequately supported as to the other utilities. Possibly, this is because under the 70 percent requirement already mentioned, the modified

---

[12] Our own review of the record (unassisted by the parties) suggests that the other utilities may ultimately be reduced to making arguments based on FERC preemption. Even here some may be better situated than others, and the details need substantial development.

Final Plan cannot be fully implemented as to any utility until it is applied to PSNH. Nor does it appear that the Commission pressed the district court for separate rulings on likelihood of success and irreparable injury as to the other utilities.

Nevertheless, if after the hearing on the permanent injunction the district court proposes to maintain an injunction to protect *all* New Hampshire utilities against the application of the modified Final Plan, then the court must explain how its determinations support such an injunction as to the carriers *other* than PSNH. We do not say this is impossible – it may depend in part on elucidation as to the other utilities of some of the FERC issues that are particularly difficult to unravel. But we think it has to be done if a permanent injunction extends beyond PSNH itself.

IV. COLLATERAL ISSUES

The Commission argues for the first time on appeal that the injunction should be vacated because the district court failed explicitly to consider whether the plaintiffs should be required to post a security bond when receiving injunctive relief. The Commission did not raise this issue in the district court and has therefore waived it. *See MCI Telecomm.*, 135 F.3d at 32; *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 896 (1st Cir. 1988). Furthermore, even if we were to reach this issue, the Commission has neglected to explain what such a bond would cover and how it is justified.

The Commission also makes a generalized argument that the injunction itself is vague or overbroad in enjoining the Commission from "requiring plaintiffs to take any action under those [specified], orders [establishing the modified Final Plan], including the filing of compliance plans," except for voluntary filings. The Commission claims that it is unsure what is and is not permissible, and it implies that this uncertainty inhibits its ability to carry out its ordinary rate-regulation responsibilities vis-á-vis the utilities – responsibilities that certainly continue at the present time.

Unlike in the cases cited by the Commission, *see, e.g., Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 898 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978), the injunction is not so sweeping and vague as to violate the "command of specificity" set down in Fed. R. Civ. P. 65(d), *see Payne*, 565 F.2d at 897; instead, it identifies as the subject of the injunction the Final Plan and the implementing orders that accompany it. The Commission can ask the district court for clarification if it thinks that some action it is proposing to take might wrongly be viewed as trespassing on the injunction. The Commission is hardly going to be held in contempt for an innocent misstep.

Affirmed.

United States Court of Appeals
For the First Circuit

No. 98-1764

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.,

Plaintiffs, Appellees,

and

CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

and

UNITIL CORPORATION, ET AL.,

Plaintiffs/Intervenors, Appellees,

v.

DOUGLAS PATCH, CHAIRMAN OF THE STATE OF NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,

Defendants, Appellants.

ERRATA

The opinion of this Court, issued on December 3, 1998, should be amended as follows:

On page 4, 3rd paragraph, lines 3 and 4, underline "In re Public Serv. Co." and "Northeast Util. Serv. Group". Also on line 4, delete period after "1st".

On page 4, 3rd paragraph, line 6, replace "ch." with "§ ".

On page 8, 2nd from last line in footnote 4, insert *"aff'd after remand."* after (1st Cir. 1993),".

On page 9, last line of 1st full paragraph, replace "R.S.A." with "N.H. Rev. Stat. Ann. § ".

On page 29, footnote 9, 1st line, insert a comma after *"See"*.

On page 29, footnote 10, 1st line, insert a comma after *"See"*

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PHOEBE D. MORSE
CLERK

UNITED STATES
COURTHOUSE
1 COURTHOUSE WAY,
SUITE 2500
BOSTON, MA 02210
(617) 748-9057

January 14, 1999

Re: 98-1764, Public Service Company of New Hampshire, Et Al., v. Douglas Patch, Chairman of the State of New Hampshire Public Utilities Commission, Et Al.

Dear Sir/Madam:

Please be advised that the opinion of the court released on December 3, 1999 [sic] has been modified and, or, corrected in the manner set forth in the attached "ERRATA". The modifications and, or, corrections should be included in all published or distributed copies of this opinion.

Phoebe D. Morse, Clerk.

cc: Mr. Dennis Lane, Esq.
Ms Sarah B. Knowlton, Esq.
Mr. Douglas W. Smith, Esq.
Mr. Philip T. McLaughlin
Ms F. Anne Ross
Mr. Lee A. Freeman, Jr.
Mr. Scott J. Mueller
Bureau of National Affairs
Commerce Clearing House
National Center for Automated
Information Retrieval
Massachusetts Lawyers Weekly
Source Acquisition
West Publishing Company

United States Court of Appeals
For the First Circuit

No. 98-1764

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ET AL.,

Plaintiffs, Appellees,

and

CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

and

UNITIL CORPORATION, ET AL.,

Plaintiffs/Intervenors, Appellees,

v.

DOUGLAS PATCH, CHAIRMAN OF THE STATE OF NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,

Defendants, Appellants.

ERRATA

1. On page 5, line 20, replace the paragraph beginning with "First, the Plan" with the following paragraph:

First, the Plan provides that effective on the implementation of compliance filings all New Hampshire electric utilities will be required to separate ("unbundle") charges for their local distribution and transmission services from their generation services and permit use of their distribution facilities to carry – for a distribution charge – electricity generated by other suppliers. In

effect, customers could then choose the source of their electrical power, the market would set prices through competition, and the Commission would merely set distribution charges (primarily based on cost) for the use of the distribution networks (which remain effective monopolies).[2] Within two years, the utilities would also be required to divest themselves of generation facilities.

2. On page 6, delete the paragraph beginning on line 6 with "Second, during a phase-in period".

3. On page 6, line 16, replace the paragraph beginning with "Third, recognizing" with the following paragraph:

Second, recognizing that market-based rates would likely not permit the utilities to recover all of their investment in existing plant in generation and transmission, the Commission provided for possible recovery of so-called "stranded investment," both in the interim (pre-divestiture) phase and in the final (post-divestiture) phase – by allowing an increment to the distribution charge over and above actual distribution cost. How much of the stranded investment would ultimately be recovered through this mechanism is a matter of substantial dispute and depends in some measure on decisions yet to be made by

---

[2] It may be helpful, even though an oversimplification, to think of distribution as the network within the town or city (*e.g.*, poles and wires) and transmission as the intercity network (*e.g.*, high voltage lines and towers). The thrust of the state plan in this respect is to open up each distribution network to multiple energy suppliers and regulate the charge for such use. Federal authorities already regulate such carriage of another supplier's power (called "wheeling") over transmission networks. *See* 16 U.S.C. §§ 824-j-824k; FERC Order No. 888, 61 Fed. Reg. 21540 (1996) (to be codified at 18 C.F.R. pts. 35 & 385).

the Commission; but in the interim phase, the aim was to cap the increment by use of a retail market proxy price to assure that the increment did not cause retail customers to pay more than 108 percent of regional average retail electric rates.

4. On page 9, line 1, replace the paragraph beginning with "On March 10, 1997" with the following paragraph:

On March 10, 1997, the district court held a hearing on the TRO request at which both sides presented oral argument; the Commission presented no counter-affidavits. Persuaded that there was a substantial threat to PSNH, the district court issued a TRO against the Commission's Orders No. 22,512 (the Final Plan) and 22,514 (the implementing order as to PSNH) pending a hearing on whether a preliminary injunction would issue. The TRO stayed Orders No. 22,512 and 22,514 only as they affected PSNH, but under the state's statute at that time, no utility was required to implement its compliance filing until compliance filings representing at least 70 percent of retail electric sales – effectively, those covering PSNH – were being implemented. *See* R.S.A. 374-F:4(IV) (1996).[5]

---

[5] This provision was amended in June 1997 to allow the Commission to implement other utilities' compliance filings prior to implementing PSNH's. Act of June 20, 1997, ch. 298, sec. 28, 1997 N.H. Laws ch. 298 (codified as amended at R.S.A. 374-F:4(IV) (1997)). Under the new provision, however, a utility with less that 50 percent of retail electric sales can petition the Commission to defer implementation of its compliance filing until compliance filings covering 70 percent of retail electric sales (*i.e.*, PSNH) are being implemented. *See* R.S.A. 374-F:4(IV) (1998).

5. On page 17, line 15, replace the paragraph beginning with "With regard to fitness for review" with the following paragraph:

With regard to fitness for review, the Commission's Final Plan adopted a specific and detailed structure for utility deregulation and ratemaking in New Hampshire. By the time of the modified preliminary injunction issued on June 12, 1998, the Commission had also disposed of requests for reconsideration. Further, the Commission issued a set of implementing orders, effectively one to each utility. These orders requested steps to be taken, including the calculation of interim stranded costs, the filing of information to calculate local distribution rates for the phase of competition, and ultimately, the institution of local distribution tariffs to permit wheeling and the corporate separation of distribution from generation.

6. On page 32, line 3, delete the paragraph beginning with "Curiously," and replace it with the following two paragraphs:

Curiously, the Commission itself has made only a limited effort to distinguish the claims of the other utilities from those of PSNH. Its reply brief on appeal says little more than that the other utilities presented "no factual or legal support" for extending the preliminary injunction to them. Nor does it appear that the Commission pressed in the district court for separate findings as to the other utilities concerning their likelihood of success and irreparable injury. Possibly, this is because PSNH represented most of the retail electricity supplied in New Hampshire and, under the amended deregulation plan, the other utilities could petition the Commission to delay

implementation until PSNH was deregulated (*see* note 5, above).

In all events, the legal claims of the other utilities were set forth in their intervenor complaints and were designed largely to mirror those of PSNH; while we have expressed our own doubts that the claims were as strong as PSNH's, the Commission has not developed this issue on appeal. As for irreparable injury, the two other utility systems involved in the appeal did allege that they would not be able fully to recover their stranded costs, one of them providing detailed affidavits. The lack of detailed findings by the district court owes much to the Commission's failure to press the point with the district judge.

United States Court of Appeals
For the First Circuit

No. 98-1764

Public Service Company of New Hampshire, et al.,

Plaintiffs-Appellees,

v.

Douglas Patch, et al.,

Defendants-Appellants.

Before

BOWNES, Senior Circuit Judge,
BOUDIN, Circuit Judge,
REAVLEY*, Circuit Judge.

ORDER OF THE COURT

January 13, 1999

The petition for rehearing is denied.

By the Court:
Phoebe D. Morse, Clerk

By: /s/ JANICE M. O'NEIL
Chief Deputy Clerk

[cc: all counsel of record]

---

* Of the Fifth Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, NORTH ATLANTIC ENERGY CORPORATION, NORTHEAST UTILITIES and NORTHEAST UTILITIES SERVICE COMPANY,	N.H. ACTION NO. 97-97-JD R.I. ACTION NO. CA 97-121L MARCH 10, 1997
Plaintiffs	
VS.	
DOUGLAS L. PATCH, Chairman of the Public Utilities Commission of the State of New Hampshire, BRUCE L. ELLSWORTH, Commissioner of the Public Utilities Commission of the State of New Hampshire, and SUSAN S. GEIGER, Commissioner of the Public Utilities Commission of the State of New Hampshire,	
Defendants.	

TEMPORARY RESTRAINING ORDER

Following a preliminary pretrial conference held pursuant to rule 16.1 of Local Rules of the United States

District Court for the District of New Hampshire, at which counsel for the plaintiffs and counsel for the defendants appeared and were heard, it is hereby

ORDERED;

Pending further order of the Court following a hearing on preliminary injunction set for March 20, 1997 at 10:00 A.M., Orders No. 22, 512 and 22,514, issued in New Hampshire Public Utilities Commission Docket No. DR96-150, are stayed to the extent, and only to the extent, that those orders establish a rate setting methodology that is not designed to recover Public Service Company of New Hampshire's costs of providing service and would require Public Service Company of New Hampshire to write off any regulatory asset under FAS 71, and defendants are enjoined from taking any action to enforce those aspects of the stayed Orders.

ENTER:

/s/ Ronald R. Lagueux
C.J. 3/10/97

CONSENTED TO AS TO FORM:

/s/ John B. Nolan
John B. Nolan, for plaintiffs

/s/ Stephen J. Judge
Stephen J. Judge, for Defendants

Attest to

True Copy

DAVID A. DIMARZIO

By: /s/ David A. DiMarzio
Deputy Clerk

PER ORDER:

/s/ Illegible

Dated: March 10, 97

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, NORTH ATLANTIC ENERGY CORPORATION, NORTHEAST UTILITIES and NORTHEAST UTILITIES SERVICE COMPANY,	:	N.H. ACTION NO. 97-97-JD
	:	R.I. ACTION NO. CA 97-121L
	:	MARCH 20, 1997
Plaintiffs	:	
VS.	:	
DOUGLAS L. PATCH, Chairman of the Public Utilities Commission of the State of New Hampshire, BRUCE B. ELLSWORTH, Commissioner of the Public Utilities Commission of the State of New Hampshire, and SUSAN S. GEIGER, Commissioner of the Public Utilities Commission of the State of New Hampshire,	:	
Defendants.	:	

AMENDED RESTRAINING ORDER

Following an evidentiary proceeding on March 20, 1997, and in order to preserve the status quo ante, it is hereby ORDERED:

Pending further order of the Court, Orders No. 22,512 and 22,514, issued in New Hampshire Public Utilities Commission Docket No. DR96-150, are stayed insofar as those orders apply to Public Service Company of New Hampshire or call into question the enforceability of the Rate Agreement dated November 22, 1989, between the State of New Hampshire and Northeast Utilities Service Company on behalf of its parent, Northeast Utilities, and defendants are enjoined from taking any action to enforce the stayed Orders as to plaintiffs.

Attest to
True Copy,

DAVID A. DIMARZIO

/s/ David A. Dimarzio
Deputy Clerk

ENTER:

/s/ Ronald R. Lagueux
Ronald R. Lagueux, C.J.
3/21/97

PER ORDER:

/s/ Illegible

Dated: March 21, 97

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE Plaintiff VS. NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION Defendant	CIVIL ACTION NO. 97-0121 FRIDAY, APRIL 3, 1998 Providence, RI

HEARD BEFORE THE HONORABLE
RONALD J. LEGUEUX CHIEF JUDGE
(TRO/PRELIMINARY INJUNCTION)

A-P-P-E-A-R-A-N-C-E:

For the Plaintiff:	John B. Nolan, Esquire and Allan B. Taylor, Esquire
For the Defendant:	Dennis Lane, Esquire and Michael Tucci, Esquire
Intervenors:	Dom S. D'Ambruoso, Esquire (For: CVE and CVPS) Joseph Kraus, Esquire (For: CVE and CVPS) Lee A. Freeman, Jr. (For: CVE and CVPS) John F. Kinney, Esquire (For: CVE and CVPS)

Glynna W. Freeman,
Attorney at Law
(For: CVE and CVPS)

Court Reporter: Judith L. Montie
215 Federal Building
Providence, RI 02903

* * *

[p. 39] your abstention order addressing the Johnston Act arguments and addressing the other argument with regard to preemption, with regard to the claim we are raising that FERC is exclusive. The clearest case in which the Court cannot abstain, the clearest case in which the claimant such as the Connecticut Valley and Central Vermont here have the right to go to Federal Court and have the Federal preemption doctrine enforced by a Federal Court. Thank you, Your Honor.

THE COURT: I'll take a short recess and come back and render a decision from the bench.

(BRIEF RECESS TAKEN)

THE COURT: Plaintiff intervenors Connecticut Valley Electric Company, and Central Vermont Public Service corporation are seeking a temporary restraining order and a preliminary injunction to, in effect, mandate the public utility commission of New Hampshire to reinstate the rates for purchased power that have been approved by the Federal Energy Regulatory Commission, which I will call FERC. And I will call the New Hampshire Commission the PUC. And I will refer to Connecticut Valley as Connecticut [p. 40] Valley and Central Vermont as Central Vermont.

The basic facts are not in dispute in this case that the PUC's action in preventing the 1998 rates from going into effect based on the purchased power costs that have been approved by FERC causes a loss to the Plaintiffs. Now, particularly, Connecticut Valley. By keeping the 1997 rates in effect, Connecticut Valley is losing two million dollars a year. It is recovering from its rate payers two million dollars a year less than the costs of its purchased power.

If the lower rates go into effect that have been prescribed by the PUC based on this concept that it isn't prudent to buy from an affiliate at a rate approved by FERC, but rather it is prudent to purchase from other sources at a lesser rate, now, the shortfall is something like four point five million a year. This is confiscation. This is unconstitutional on its face.

Clearly *Mississippi Power* applies to this fact situation. The PUC has no power to override the approvals given by FERC. So there is a violation of the supremacy clause [p. 41] because there is Federal preemption of these interstate rates.

This decision from the bench does not have to be lengthy. It's obvious to me that what the PUC is doing in New Hampshire is attempting to change rate making, traditional concepts of rate making. And as I stated in my previous decision on abstention, the PUC is trying to go from a cost-base method of rate making, which is recognized everywhere in the nation and at the Federal level, to some sort of a market system where the rates in New Hampshire will be set based on some average of the rates throughout New England. One can readily see that that system is fraught with difficulties, because it would only

be by coincidence that the rate set by that method would allow a utility to recover the cost of service plus a reasonable rate of return. It is that policy which I enjoined previously as part of the restructuring orders that I issued. I told the PUC that they couldn't do this until I heard this matter on the merit. What is happening here today is an end run, an attempt to apply that same principle of rate making to these Plaintiffs by using a market [p. 42] approach rather than a cost approach.

The preemption issue and the confiscation issue are of paramount importance in the overall case and they are of paramount importance in this particular facet of the case involving these Plaintiff intervenors. And it's necessary to hold everything until I can hear the matter on the merits.

Now, the PUC makes several argument [sic] on why I should not issue a temporary restraining order or a preliminary injunction in this matter. And all of those arguments are without merit.

The first argument is that this is not a related proceeding, and this should have been brought as a separate case. The short answer to it is, that if it had been brought as a separate case, it would have been consolidated with the main case because it raises the same issues. So the Court can deal with it within the framework of the overall case since the Plaintiffs have been allowed to intervene in this matter and have a stake in the outcome of the hearing on the merits, the determination of whether there has been a violation of the [p. 43] supremacy clause and the takings clause.

Another argument that's made by the PUC is that the Johnston Act applies and precludes this Court from exercising jurisdiction. The Johnston Act applies where four conditions are shown.

First, that jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution.

Two, the order does not interfere with interstate commerce.

Three, the order has been made after reasonable notice and hearing.

And four, a plain and speedy efficient remedy may be had in the Courts of the state.

I set forth various reasons why the Johnston Act did not apply to the overall proceeding, and I am satisfied it certainly doesn't apply to this proceeding.

It does not apply because the Federal preemption is at work here. The Federal law provides for exclusive jurisdiction in FERC to establish these interstate wholesale rates and [p. 44] the commission cannot change that.

So, the order that's outstanding at the moment and the order that is proposed to be entered to change these rates does interfere with interstate commerce. It is a burden on interstate commerce. And it interferes with the FERC's preemptive authority to deal with these interstate rates.

Another argument is made that the Courts cannot stay suspension orders. When a suspension order causes

confiscation, the Court can certainly deal with it and will deal with it today.

And another argument is made that the matter is not ready, is not ripe for determination. And that argument is rejected. This is ripe because confiscation has taken place.

Then the final argument is that there hasn't been a showing as required by the First Circuit decision for the issuance of a preliminary injunction. Everyone is familiar with the four part test for the issuance of a preliminary injunction.

First, there has to be a [p. 45] likelihood of success on the merits. The potential for irreparable harm if the injunction is denied, must be evident. There is a balance that has to be struck between the hardship to the nonmovant if enjoined as contrasted with the hardships of the movant if no injunction is issued and finally, the effect, if any, on the public interest.

I am satisfied in this case that there's a very high likelihood of success on the merits of the overall case and in this particular part of the case. And irreparable harm is taking place daily to these particular Plaintiffs by the loss of these funds. On balance, it's necessary to issue a preliminary injunction in this case and, although, there is a public interest in low rates, that public interest has to take a backseat to other constitutional principles where businesses cannot have their businesses confiscated by this type of conduct and Federal power under the supremacy clause disregarded.

And so I am satisfied that a preliminary injunction should issue. There is no need to issue a temporary

restraining order and [p. 46] have a hearing on preliminary injunction because the basic facts here are undisputed, and it is obvious to the Court that the PUC has to be enjoined from taking these actions against these Plaintiff intervenors.

So the preliminary injunction is in a mandatory form. The preliminary injunction need not be very complicated. Essentially, what I mandate is that the PUC reinstate the RS-2 rates and allow Connecticut Valley to charge those rates for 1998, as they would have done had the actions of the PUC not intervened.

Prepare a preliminary injunction order, Mr. Freeman.

MR. FREEMAN: Thank you, Your Honor.

THE COURT: For entry by the Court. And I hope everybody is here that's connected with the main litigation. Is there anyone missing, does anyone know? I would like – I am sorry.

Everyone here that's interested, all the intervenors?

MR. NOLAN: I believe so, Your [p. 47] Honor.

THE COURT: I want to put the main case on as scheduled so we can hear it on the merits and if you are all here, I have a very simple pretrial order that I entered, and I set a discovery closure date. I set a date for filing pretrial memoranda, and then we will have a trial as soon as case matures.

Does anyone have any thoughts on how long you want to discover, what's left to be discovered in this case.

MR. LANE: Six months at a minimum.

THE COURT: Six months?

MR. D'AMBRUOSO: Plaintiffs are prepared now. We don't need any discovery.

MR. FREEMAN: We would concur on that, Your Honor. We think we can move forward much more promptly than six months.

THE COURT: What requirement is there for the commission? What requires six months of discovery on the commission's side?

MR. LANE: Your Honor, we have to discover the facts behind their claims. I mean, our orders are open orders and, of course, they [p. 48] don't want to discover anything. But we have to find the facts behind the claims. We don't have those facts. We also would expect that they would want to put in experts so that there would be expert reports. I mean, there is no reason for us to want to hold up this case, Your Honor, be assured of that.

THE COURT: I understand. There's an injunction outstanding and will continue to be outstanding.

All right. Well, I will give you the six months.

(PAUSE)

THE COURT: All right. We'll close discovery on October 2, 1998. I will require pretrial memos to be filed by November 6th, 1998, and this case will be ready to be heard in November. I will give you a specific date for hearing because what I usually do is I try the Jury trial cases in the early part of the month, and then when my jury trial calendar runs out, I fit in my non-Jury cases.

And so probably near the end of November this case can be reached if everybody stays on schedule.

I will issue my pretrial [p. 49] order. My normal pretrial order as you will see, it is the short form around here, and I'm just a believer in back to basics rather than complicated pretrial orders.

And under that pretrial order you will see that you have ten days after the close of discovery to file any motions.

All right. Is there anything else we should discuss?

It is probable there will be a motion to further extend my preliminary injunction?

MR. FREEMAN: Yes, Your Honor. Yes.

THE COURT: You are going to make a motion.

MR. FREEMAN: Yes. When would you want me to submit the order, Your Honor, can I go back to my office and type it up or stay here?

THE COURT: Sure.

MR. FREEMAN: Thank you.

THE COURT: Sure, the order is effective right from the bench.

Is there anything else to talk about?

[p. 50] All right. Take a recess.

(RECESS TAKEN)

CERTIFICATION

I, Judith L. Montie, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the matter before Ernest C. Torres, District Judge.

_____

Judith L. Montie

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, NORTH ATLANTIC ENERGY CORPORATION, NORTHEAST UTILITIES, and NORTHEAST UTILITIES SERVICE COMPANY, Plaintiffs, and CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION, Plaintiffs/Intervenors, v. DOUGLAS L. PATCH, Chairman of the Public Utilities Commission of the State of New Hampshire, BRUCE B. ELLSWORTH, Commissioner of the Public Utilities Commission of the State of New Hampshire, and SUSAN S. GEIGER, Commissioner of the Public Utilities Commission of the State of New Hampshire, Defendants.	District of N.H. C.A. NO. 97-97-JD District of R.I. C.A. No. 97-1211.

PRELIMINARY INJUNCTION

This matter is before the Court on the motion of plaintiffs-intervenors Connecticut Valley Electric Company ("Connecticut Valley") and Central Vermont Public Service Corporation ("Central Vermont") for a Temporary Restraining Order and Preliminary Injunction against the New Hampshire Public Utilities Commission ("NHPUC") to allow Connecticut Valley to recover through retail rates the costs for wholesale power requirements service that Connecticut Valley purchases from Central Vermont pursuant to the FERC-authorized RS-2 Rate Schedule.

This Court conducted a hearing on the Connecticut Valley-Central Vermont motion on April 3, 1998, at which time both Connecticut Valley-Central Vermont and the NHPUC presented arguments of counsel. In addition, the Court has considered the legal memoranda, affidavits and exhibits submitted by the parties. The Court finds for the reasons stated on the record at the conclusion of the April 3 hearing that Connecticut Valley-Central Vermont have established each of the prerequisites for preliminary injunctive relief, and

IT IS HEREBY ORDERED that pursuant to Rule 65 of the Federal Rules of Civil Procedure:

1. The NHPUC is directed and required to allow Connecticut Valley to recover through retail rates all costs for wholesale power requirements service that Connecticut Valley purchases from Central Vermont pursuant to its FERC-authorized RS-2 Rate Schedule effective January 1, 1998 until further court order.

2. The Court adopts as its findings of fact and conclusions of law the statements it made on the record at the conclusion of the April 3 hearing.

3. This Court retains jurisdiction over this action and the parties hereto for the purposes of enforcing this injunction and granting such additional relief as may be hereafter necessary or appropriate.

ENTER:

/s/ Ronald R. Lagueux
Chief Judge
Ronald R. Lagueux

April 9, 1998

PER ORDER:

/s/ Illegible

April 9, 1998

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

* * *

****

PUBLIC SERVICE COMPANY of NEW HAMPSHIRE, et al

VS.

DOUGLAS L. PATCH, et al

C.A. NO. 97-121 L

PROVIDENCE, R.I.
5 JUNE 98

****

BEFORE HONORABLE CHIEF JUDGE
RONALD R. LAGUEUX
APPEARANCES:

FOR PUBLIC SERVICE OF NEW HAMPSHIRE	ALLAN B. TAYLOR, ESQ. CityPlace Hartford, CN 06103-3499 860-275-0100
FOR DOUGLAS L. PATCH CHAIRMAN	DENNIS LANE, ESQ. MICHAEL E. TUCCI, ESQ. 1150 18th Street Suite 800 Washington, DC 20036-3816 202-785-9100
CONNECTICUT VALLEY ELECTRIC CO	DOM D'AMBRUOSO, ESQ. P.O. Box 600 Concord, NH, 03302-0600 603-228-0477 JOSEPH M. KRAUS, ESQ. 77 Grove Street Rutland, VT 05701 802-747-5429

CENTRAL VERMONT PUBLIC SERVICE and CVEC	LEE A. FREEMAN, ESQ. JOHN F. KINNEY, ESQ. 402 N. Michigan Ave. Suite 3200 Chicago, Il, 60611 312 222 5100
UNITIL COMPANIES	PAUL K. CONNOLLY, ESQ. 260 Franklin Street Boston, MA 02110 617-439-9500
Court Reporter:	JOSEPH A. FONTES One Exchange Terrace Providence, RI 02903 401-273-0344

* * *

[p. 13] THE COURT: When I issued the preliminary injunction in this particular phase of the case, I made the four part analysis that's required by the First Circuit. Ross Simons of Warwick, Inc. v. Bacarat, Inc., is one of the more recent cases from the First Circuit on this subject, and it's found at 102 F.3d 12, First Circuit (1996). I'm very familiar with the Ross Simons case because it arises out of a consent judgment and agreement that I approved. Then the case was heard by Judge Boyle, and he issued a preliminary injunction. The First Circuit upheld his issuance of the preliminary injunction. Now the case is back and I have it, and I will rule on the merits of that case.

What is significant about that case is that the ultimate determination of that case turns on a question of law, and it's likely, in my view at this time, that Bacarat will

prevail, and that the preliminary injunction will be dissolved, and no permanent injunction will issue. So that illustrates the deference that the Appeals Court will give to a trial judge who issues a preliminary injunction.

This was about as weak a case for the issuance of a preliminary injunction that I know of, and yet the First Circuit upheld it.

[p. 14] The four part test is, of course, whether the plaintiff has illustrated that there's a likelihood of success on the merits, whether the applicant for the injunction has shown irreparable harm if the injunction is denied. The plaintiff must also show that the balance of relevant impositions, that is, hardships, is greater to it if the injunction is not granted than to the defendant if the injunction is granted, and, finally, what affect there will be on the public interest.

I analyzed all those factors when I issued this preliminary injunction. To ask me now to stay it pending appeal is to ask me to conclude that I was wrong. On the contrary, I think I was right. Looking at the matter again, anew, afresh, I think I'm going to be affirmed by the First Circuit. So there's no basis for me to stay this preliminary injunction in view of the fact that without it there would be enormous harm on the plaintiffs in this case, and would, in effect, I think, force them into bankruptcy.

So, under the circumstances, it seems clear to me that this preliminary injunction should stay in effect until the First Circuit has an opportunity to consider this matter. If the First [p. 15] Circuit decides I was wrong, then they can fashion the remedy.

So the motion to stay the preliminary injunction pending appeal is denied.

Now the last motion that's before me is a motion by all the plaintiffs, apparently, the original plaintiff's and the intervening plaintiffs, for me to issue an amendatory preliminary injunction in the basic case, and I'll hear from plaintiffs' side on that motion.

MR. FREEMAN: Yes, your Honor. This motion was filed by all the intervening plaint – well, it was filed by Public Service New Hampshire, Unitil and Central Vermont. It was filed in response to your inquiry at the close of the last hearing to make it clear that the previous stays your Honor had entered applied to all parties, and continued to apply to the amended restructuring order issued by the PUC on March 20, 1998.

THE COURT: Well, what is it that you think the PUC is going to do, or has done, that is in question from my previously issued restraining order, or whatever it may be called?

MR. FREEMAN: Well, first and most seriously, your Honor, it has threatened to hold

* * *

[p. 20] have any questions, otherwise, it's –

THE COURT: All right.

MR. FREEMAN: May I just briefly respond?

THE COURT: Yes, go ahead.

MR. FREEMAN: Your Honor, I would just note two things. First of all, the proposed order very carefully

tracks your prior orders, and especially your language at 962 F.Supp. 244, that utilities should not be forced to go through a transitional process when the key aspects of this regulatory landscape, the legal validity of it, is not determined. We've done as well as we can. We can't make compliance filings because we don't know what there is to comply with yet. It's under challenge.

The second point is that this does not interfere with the Commission's ability to secure voluntary compliance in settlement negotiations because we carved that out of the Order.

And, third, we do need protection against the arbitrary interpretation of the Order to impose these fairly serious fines upon our company and our agents.

THE COURT: It should be abundantly clear by now to the Commission, and all others connected [p. 21] with this case, that there are substantial constitutional issues involved in this matter: Issues of confiscation, issues of supremacy of federal regulatory agency orders, and that the issues in the case have not been finally decided yet. They will be decided by this Court when discovery is completed and there is a hearing on the merits, which I have tentatively scheduled for November.

As I've already indicated, these Restructuring Orders may be substantially gutted after I hear this case on the merits to such an extent that there is really nothing left. Therefore, it has been my view all along that implementation of the original Restructuring Order, and now the Amended Restructuring Order, should be stayed until this Court hears this matter on the merits, and that includes requiring these Utilities to file compliance plans

because that may be a complete waste of time and effort, depending on the outcome of this case.

So I want to make it abundantly clear that the Commission should not require the filing of these compliance plans, and if there is any doubt about it, I am going to remove that doubt today. I'm also making it clear that this injunction applies to all the plaintiffs, including the intervening [p. 22] plaintiffs.

So it seems to me reasonable that this amended order be entered so that there will be no question about it for the immediate future until this case is heard on its merits.

It seems to me the Order that is proposed by the plaintiffs is reasonable, and I will enter it.

The motion of the plaintiffs for an amended preliminary injunction is granted as follows: Pending further order of the Court following a trial on the merits, now scheduled for November 1998, as requested by defendants, defendants are enjoined from requiring any plaintiff, including plaintiff intervenors, to implement New Hampshire revised statutes annotated, Section 374-F, in accordance with the New Hampshire Public Utilities Commission's Orders issued in Electric Utility Restructuring Docket Number DR 96-150, or requiring plaintiffs to take any action under those orders, including the filing of compliance plans.

This Order shall not preclude the defendants from considering or ruling upon any voluntary filings made by the plaintiffs to implement New Hampshire revised statutes annotated, Section [p. 23] 374-F, including the filing of settlements or submission of compliance plans.

Put that in the form of an Order for me to sign, a written order for me to sign. All right.

MR. FREEMAN: Yes, your Honor.

THE COURT: Is there anything else?

MR. FREEMAN: I would just note, your Honor, that we did attach a proposed order in that form.

THE COURT: Well, it has some language in it at the beginning that is not appropriate.

MR. FREEMAN: Fine. We'll change that. I would like to clarify just one last matter. The Commission has scheduled a hearing on June 11th to show cause why we should not be held in contempt. I assume that under your order as clarified, the Commission cannot proceed with that hearing and hold us in contempt?

THE COURT: I can't speak in any clearer language.

MR. FREEMAN: Thank you, your Honor.

THE COURT: This case is frozen until I hear it on the merits. The restructuring orders are frozen. All right, we'll take a recess.

(RECESS)

[p. 24] CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joseph A. Fontes
JOSEPH A. FONTES

June 8, 1998
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, NORTH ATLANTIC ENERGY CORPORATION, NORTHEAST UTILITIES, and NORTHEAST UTILITIES SERVICE COMPANY, Plaintiffs, and CONNECTICUT VALLEY ELECTRIC COMPANY, CENTRAL VERMONT PUBLIC SERVICE CORPORATION, CONCORD ELECTRIC COMPANY, EXETER & HAMPTON ELECTRIC COMPANY, UNITIL CORPORATION, and UNITIL POWER CORP., Plaintiffs/Intervenors, v. DOUGLAS L. PATCH, Chairman of the Public Utilities Commission of the State of New Hampshire, BRUCE B. ELLSWORTH, Commissioner of the Public Utilities Commission of the State of New Hampshire, and SUSAN S. GEIGER, Commissioner of the Public Utilities Commission of the State of New Hampshire, Defendants.	District of N.H. C.A. NO. 97-97-JD District of R.I. C.A. No. 97-121L

ORDER

(Filed June 12, 1998)

IT IS HEREBY ORDERED that pending further order of the Court following a trial on the merits now scheduled for November 1998 as requested by defendants, defendants are enjoined from requiring any plaintiff, including plaintiff/intervenors, to implement New Hampshire Revised Statutes Annotated § 374-F in accordance with the New Hampshire Public Utilities Commission's orders issued in the Electric Utility Restructuring Docket DR 96-150, or requiring plaintiffs to take any action under those orders, including the filing of compliance plans. This order shall not preclude defendants from considering or ruling upon any voluntary filings made by the plaintiffs to implement New Hampshire Revised Statues [sic] Annotated § 374-F, including the filing of settlements or submission of compliance plans.

ENTER:

/s/ Ronald R. Lagueux
Chief Judge Ronald R. Lagueux

June 12, 1998

PER ORDER:

/s/ Barbara L. Barletta

June 12, 1998

DR. 96-150

Statewide Electric Utility Restructuring

CONNECTICUT VALLEY ELECTRIC COMPANY

Order Addressing Request for Interim Stranded Cost Charges

ORDER NO. 22,509

February 28, 1997

I. INTRODUCTION AND PROCEDURAL HISTORY

The Legislature directed the New Hampshire Public Utilities Commission (Commission) to establish interim stranded cost charges for each utility, to remain in effect for no more than two years following the implementation of each utility's compliance filing. RSA 374-F:4, VI. As explained in the Final Plan, when setting these charges, the Commission must apply essentially the same principles that will guide the setting of final stranded cost charges, though the Legislature made it clear that the Commission was authorized to set these charges "without a formal rate case proceeding . . . " Final stranded cost charges are to be determined in the context of rate case proceedings and must be: (a) equitable, appropriate, and balanced, (b) in the public interest, and (c) substantially consistent with the interdependent principles in the legislation. RSA 374-F:3, XII(a) and (d). For purposes of setting interim stranded cost charges, however, the Legislature authorized the Commission to make "preliminary" findings in applying these guiding principles.

On November 8, 1996, Connecticut Valley Electric Company (CVEC) filed the testimony of William Deehan in support of its proposed interim stranded cost charges.

On December 27, 1996, Cabletron Systems, Inc. (Cabletron) filed the opposing testimony of Andrew Weissman, and on January 3, 1997, La Capra Associates submitted a report entitled "Estimating Stranded Costs for New Hampshire Electric Utilities" which among other things developed interim stranded cost charges for each utility. On January 15, 1997, CVEC requested orally that the Commission strike certain parts of Cabletron's testimony on the grounds that Mr. Weissman is not a member of the New Hampshire bar. The Commission denied CVEC's motion. This order addresses CVEC's petition for interim stranded costs recovery.

On January 2, 1997, a prehearing conference was conducted to address procedural matters in CVEC's interim stranded cost proceeding. The Commission issued on January 10, 1997, a secretarial letter advising the parties of the time allotted to each party in the proceeding. A hearing relative to CVEC-specific issues was conducted on January 15, 1997 at which testimony was presented by witnesses for CVEC and Cabletron. On January 27-30, 1997, a hearing relative to certain generic interim stranded cost issues was conducted at which testimony was presented by witnesses for Unitil, GSEC, CVEC, PSNH, GSHA, Cabletron, Manchester, NHMA, Freedom, OCA and La Capra Associates. The positions of the parties and the Commission's analysis and findings on those generic issues are contained in Section V.F.3. of the Final Plan. The findings are, however, utilized in this order to determine appropriate interim charges for CVEC.

II. POSITIONS OF THE PARTIES

A. CVEC

Mr. Deehan testified that CVEC's rates are close to the New England regional average based on 1995 data and therefore satisfy one of the major criteria for full recovery specified in RSA 374-F:4 and the Commission's Preliminary Plan. Additionally, he testified that CVEC's rates would drop substantially if it is successful in its FERC action against the Wheelabrator QF located in Claremont. According to Mr. Deehan, CVEC's rates could drop between 14% and 18% if the Wheelabrator plant lost its QF status. Mr. Deehan also testified that CVEC's parent, Central Vermont Public Service Corporation (CVPS), has realized significant power cost savings for CVEC customers through multiple renegotiations of its Hydro Quebec contracts.

CVEC's proposed interim stranded cost charges were developed by calculating the difference between CVEC's projected purchased power cost and its market price for the year 1998.[1] This lost revenue approach to quantifying stranded costs reflects, according to CVEC, the net difference between CVPS's assets valued below and above prevailing and anticipated market conditions, and the results of mitigation efforts to date. The workpapers supporting these charges assume a continuance of the power cost obligations under the requirements contract with

---

[1] Interim charges were initially provided on a class-by-class basis, without billing determinants. See Exhibit – WJD-2. Information subsequently provided by CVEC indicated a company average of 5.2 ¢/kWh in 1998 and 5.9¢/kWh in 1999.

CVPS and a market price of 2.5 ¢/kWh for a net annual stranded cost of $11.5 million. CVEC recommended that the lost revenue calculation be performed annually and reviewed in a contested case in which CVEC has the burden of supporting its projected power costs and market prices.

With respect to the recommendations in the La Capra Associates report, Mr. Deehan testified that while Mr. Yoshimura correctly adjusted the regional average rate to reflect CVEC's customer mix, it failed to correct for other differences between CVEC and the "average utility." Those differences include customer density, size of individual customers, individual customer load shapes, terrain, mandatory QF burden, level of C&LM activities, vintage of transmission and distribution facilities, and differences in service quality. He also disagreed with the use of 1995 average prices as a proxy for 1998 prices, noting in particular that CVEC's ongoing base rate case and its Wheelabrator petition at the FERC could cause CVEC's average rates to diverge significantly from those reported for 1995. Finally, Mr. Deehan testified that the market price estimates for 1998 and 1999 in the La Capra Associates report are unreasonably high and result from a questionable attempt to forecast a market which does not exist and for which there is no reasonable proxy.

With respect to the financial impact on CVEC of not being allowed to recover all of its stranded costs, he stated that over time equity in the company will decrease to a point where CVEC will be in default of its loan covenants. Mr. Deehan also testified that an inability to pay dividends will prevent the company from attracting the capital to ensure system safety and reliability.

In its brief, CVEC argued that due to the history of its relationship with CVPS and FERC's approval of the power supply agreement, the Commission is preempted from preventing full cost recovery.

B. Cabletron and Retail Merchants Association

Much of Mr. Weissman's oral testimony addressed the alleged failure of CVEC to properly analyze the potential benefits of terminating its wholesale power contract with CVPS. Because the notice period is only one year, he believes that CVPS would have a significant hurdle to overcome in persuading FERC that it had a reasonable expectation of continuing to provide service to CVEC for an extended period of time. According to Weissman, CVEC management should have terminated the agreement in 1993 or 1994 but did not do so because of a conflict of interest.

Mr. Weissman also argued that CVEC's justifications for not terminating the contract do not stand up to scrutiny. For example, he noted that CVEC faces virtually no downside risk from terminating the contract. At worst, it would continue to pay (for a limited time) the same stranded costs as it pays now; at best it would avoid altogether the above-market portion of its current power bill. Indeed, under FERC's stranded cost recovery standards, Mr. Weissman pointed out that it is CVPS that has the burden of rebutting the presumption that it had no reasonable expectation of indefinitely continuing to serve CVEC.

In his pre-filed testimony, Mr. Weissman argued that CVEC failed to address the statutory requirement to balance the interests of customers and shareholders in establishing the amount of any interim stranded cost charge. He also contended that CVEC did not address the requirement to provide immediate rate relief in setting the interim charge, or take into account any value in its distribution system.

The Retail Merchants Association participated in the hearing through cross-examination and joined Cabletron in support of its brief.

C. OCA

On the issue of contract termination, the OCA noted that the Commission in DR 83-200 found that "CVEC has the burden of proving that its purchases of wholesale power from CVPS under the RS-2 rate are reasonable." Also, "the wholesale rate must be justified by the utility as the product of reasonable efforts to secure the lowest cost in light of the appropriate alternatives available to the Company." Based in part on these warnings, the OCA argued that CVPS could not and should not have expected the power purchase agreement to continue indefinitely.

D. La Capra Associates

The La Capra Associates report to the Commission provides estimates of interim stranded cost charges which Mr. Yoshimura believes are consistent with RSA

374-F:4 and the methodology outlined in the Commission's Preliminary Plan. The key feature of Mr. Yoshimura's interim stranded cost methodology is the establishment of a total average rate target for each New Hampshire electric utility designed to achieve an overall rate decrease for those utilities with total average rates greater than the regional average rate. Under this approach, the interim stranded cost charge is computed as the difference between (a) the average rate target and (b) the sum of the transmission and distribution costs and the market price of electricity. Mr. Yoshimura computed interim charges for each utility using three different average rate targets, i.e., 100%, 104.5% and 107.8% of the 1995 average regional rate, and the base case market price estimates of Mr. La Capra. Mr. Yoshimura also recommended that the interim stranded charges be modified every six months during the interim period.

On cross-examination, Mr. Yoshimura stated that he computed an adjusted regional average rate for each New Hampshire utility that reflected each utility's class mix but did not adjust for differences among utilities for QFs, C&LM, load shape and vintage of T&D.

In order to encourage mitigation of stranded costs, Mr. Yoshimura recommended establishing an inverse relationship between the return on equity earned on the stranded assets and the level of the stranded cost charges. He proposed a maximum ROE of 11% for a utility with no stranded costs and a 1% reduction for each 1¢/kWh increase in the stranded cost charge. For the portion of the interim stranded cost charge used to offset the stranded costs associated with owned generation and regulatory assets, Mr. Yoshimura noted that his proposed

sliding scale return on equity would only affect the allocation of interim stranded cost charge revenues between the return and depreciation components of the charge. During the period in which interim stranded cost charges are in effect, the sliding scale return on equity would not impact the level of interim stranded cost charges as these are computed so that the sum of interim stranded cost charges, T&D charges, and market prices equal a previously specified average rate target. Mr. Yoshimura did note that his sliding scale return on equity could be used to introduce incentives for electric companies to minimize final stranded cost charges, particularly by allowing electric companies to earn higher returns if such companies are able to increase the purchase value of divested generation resources; in this instance, the sliding scale return on equity could impact the level of final stranded cost charges.

Mr. Yoshimura recommended interim stranded cost charges of 3.32¢/kWh in 1998 and 3.19¢/kWh in 1999 for CVEC. In contrast, CVEC filed an interim stranded cost charge of 7.02¢/kWh in 1998; the Company did not file an interim stranded cost charge for 1999. He testified that most of the difference between his estimates and those of CVEC can be accounted for by differences in market prices, inconsistencies in power costs and projected sales data between those reported in CVEC's Appendix C data and those used by the Company to compute interim stranded cost charges, and differences in the T&D costs used in the computation of rates.

III. COMMISSION ANALYSIS

A. Termination of Wholesale Requirements Contract

The most significant issue addressed by the parties in this interim stranded cost proceeding relates to the question of whether CVEC is obligated to pay stranded costs to CVPS after the notice period in the contract term. Because our findings on the issue could potentially eliminate the need to consider most other issues, we analyze first CVEC's obligations under its partial requirements contract and then proceed to review other matters as necessary.

CVEC's obligation to provide its customers with bundled electric service ends on the day its customers are given the opportunity to choose their power supplier. As of that date CVEC will no longer require service under its wholesale contract with its parent CVPS. Further, because the contract contains only a one year notice provision, and the law authorizing competition on January 1, 1998 was passed in 1996, CVEC had the capability to get out of the contract prior to the initiation of competition and avoid additional power costs.[2] Its failure to do so bears directly on the level of stranded cost recovery, if any, that CVEC should be allowed to receive in the interim and future years.

The failure to give notice raises the important question of whether CVEC should be permitted to recover

---

[2] While notice could have been given any time, there is no possible reason why notice should not have been given any later than May 22, 1996, the day following passage of RSA 374-F.

costs incurred under the contract for any period beyond the time when the contract would have terminated had CVEC given notice. We conclude based on the evidence before us that CVEC had nothing to lose, and everything to gain from terminating the contract, but chose not to because of a clear and unmistakable conflict of interest, a conflict noted by the Commission as early as 1986. *See*, 71 NHPUC 145, 148 (1986). Further, based on a review of the contract's termination clause and the history of the relationship between CVEC and CVPS, we find nothing to preclude us from prohibiting the recovery of such "extra" contract costs. For these reasons, we will deny CVEC's request to recovery stranded costs related to its contract with CVPS. For the same reasons, Mr. Yoshimura's proposed sliding scale ROE is not relevant for CVEC because the Company owns no generation plants, and because the purchased power obligation between CVEC and its affiliated generation supplier should cease before the effective date of interim stranded cost charges.

We recognize that in Order 888 the FERC stated that a supplier could amend an existing contract to recover costs which are unamortized at the time of the contract's expiration. While some might argue that such an action is an "order" from the FERC and hence preemptive under the Federal Power Act, we disagree. We discuss these questions more fully in our Legal Analysis at Parts I.A.5.a. and I.A.6.

Notwithstanding the above, we have been directed by our Legislature to allow the recovery of "net non-mitigatable stranded costs associated with . . . power acquisitions mandated by federal statutes or RSA 362-A." RSA 374-F:3, XII(b). Consequently, we will approve

interim stranded cost charges for CVEC which provide for full recovery of the above-market portion of the Wheelabrator and other QF purchase power costs associated with existing long-term QF power purchase commitments entered into by CVEC and approved by the Commission. We are satisfied that CVEC has, thus far, taken, through its filing with the FERC, all appropriate steps to mitigate the Wheelabrator power costs. We expect the company to continue such efforts and will condition future recovery on such efforts.

B. Regional Average Rate Analysis

Given our decision to deny CVEC's request to recover above-market CVPS power costs in 1998 and 1999, our analysis and findings on the regional average rate approach to quantifying interim stranded costs are no longer relevant to this proceeding. CVEC's interim stranded costs are simply the above-market purchased power costs incurred in 1998 and 1999 from Wheelabrator and other QFs for which CVEC presently has long-term purchase contracts approved by the Commission, to the extent fully mitigated.

C. Market Price of Power

Several approaches to estimate the market price of electricity during the two-year interim period were proposed. A summary of these approaches, along with our analysis and findings, is presented in Section V.F.3.a. of the Final Plan. Consistent with those findings, we used

the following transmission-adjusted market prices to estimate the above-market power costs associated with committed QF purchases: 4.49 ¢/kWh in 1998 and 4.62 ¢/kWh in 1999.

D. Financial Impact

CVEC's decision not to give notice of termination on or before December 31, 1996 was made, we believe, imprudently to protect CVPS's financial interest at the expense of New Hampshire customers. Our obligation to disapprove the pass through of imprudent projected power costs in 1998 should not be viewed as limited by concerns about the financial integrity of CVEC. Moreover, decisions allowing the pass through of imprudent costs only invite more imprudence, to the long-term detriment of the company, its shareholders, creditors and customers. As for 1999, we note that CVEC has until December 31, 1997 to terminate the contract and avoid all power costs in that year, in which case there would be no negative financial impact to CVEC.

E. True-Up

Although RSA 374-F does not explicitly require that we reconcile interim and final stranded cost charges, we believe that to do so would be equitable, consistent with the goals of the Legislature and in the public interest. Following the advice of our consultant, we will limit such reconciliations to variations in purchased power costs associated with QFs (such as the Wheelabrator facility) for which CVEC presently has long-term purchased

power contracts approved by the Commission, retail sales, and market prices from those initially assumed in determining interim stranded cost charges. Reconciliation will be conducted annually and CVEC will have the burden of justifying any changes to the approved charges.

Based upon the foregoing, it is hereby

ORDERED, that CVEC's proposed interim stranded cost charges are denied; and it is

FURTHER ORDERED, CVEC recalculate and file by March 31, 1997, interim stranded cost charges to recover the projected above-market power costs associated with power purchases from the Wheelabrator generating facility located in Claremont and other QFs from which CVEC must purchase power pursuant to existing long-term purchase power contracts approved by the Commission; and it is

FURTHER ORDERED, that the above-mentioned charges be determined using the market prices referenced herein; and it is

FURTHER ORDERED, that such interim stranded cost charges filed pursuant to this Order be based on projected power purchase costs for 1998 and 1999 filed by CVEC in this proceeding, and subject to further true-up as described herein; and it is

FURTHER ORDERED, that CVEC shall give notice to terminate its existing requirements service contract with CVPS.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of February, 1997.

/s/ Douglas L. Patch
Douglas L. Patch
Chairman

/s/ Bruce B. Ellsworth
Bruce B. Ellsworth
Commissioner

/s/ Susan S. Geiger (cd)
Susan S. Geiger
Commissioner

Attested by:

/s/ Thomas B. Getz
Thomas B. Getz
Executive Director and Secretary

DR 97-241

CONNECTICUT VALLEY ELECTRIC COMPANY

Fuel Adjustment Clause and Purchased Power Cost Adjustment

Order Setting FAC and PPCA Rates Temporarily at Existing Rates, Approving Proposed QF Rates, Finding Imprudence For Not Terminating Power Purchase Contract and Setting Date for Hearing on Appropriate Level of Power Costs to Include in Rates

ORDER NO. 22,815

December 31, 1997

APPEARANCES: Kenneth Picton, Esq. for Connecticut Valley Electric Company; Ransmeier and Spellman by Dom S. D'Ambruoso, Esq. and John T. Alexander, Esq. on behalf of Connecticut Valley Electric Company; McLane, Graf, Raulerson and Middleton by Steven V. Camerino, Esq. on behalf of the City of Claremont; Kenneth Traum for the Office of Consumer Advocate for residential ratepayers; and, Robert Frank, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On November 26, 1997, Connecticut Valley Electric Company, Inc. (CVEC or the Company), filed with the New Hampshire Public Utilities Commission (Commission) its proposed Fuel Adjustment Clause (FAC), Purchased Power Cost Adjustment (PPCA) and Short-Term Energy Purchase Rate. The filing included proposed tariff pages to be effective for bills rendered on or after January 1, 1998: 15th Revised Page 17, 12th Revised Page 18, 10th Revised Page 50, and 7th Revised Page 51.

In addition, the Company's proposal includes revised Pilot tariffs due to changes in the costs upon which the FAC and PPCA charges are based so that Pilot customers are neither advantaged nor disadvantaged with respect to regular bundled tariff customers. Revised Pilot tariff pages are: 4th revised Page 53, 54 and 55; 3rd revised Page 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66. The Office of Consumer Advocate (OCA) is a statutorily authorized intervenor.

On November 17, 1997, the City of Claremont filed a complaint against CVEC and a petition for a reduction of electric rates. On December 10, 1997, the Commission consolidated the complaint proceeding, which had been initially docketed as DC 97-244, with the FAC and PPCA proceeding.

At the hearing, the Commission heard arguments concerning the scope of the proceeding, based on a Motion to Dismiss by CVEC, which the Commission denied. Four Central Vermont Public Service (CVPS) witnesses testified on behalf of CVEC: Peter Damien Lena, Ph.D., Principal Consultant – Forecasting; Charles A. Watts, Senior Marketing Analyst; C.J. Frankiewicz, Financial Analysis Coordinator; and, Scott R. Anderson, Regulatory Compliance Facilitator.

After the hearing, CVEC filed a record request which adjusted its proposed FAC and PPCA rates due to a revised 1998 sales forecast. On December 24, 1998, the Company, based upon a request of Staff, submitted a letter to the Commission which described how CVPS intends to respond to a December 17, 1997 decision by the Federal Energy Regulatory Commission (FERC) in docket

ER97-3435 concerning CVPS's request at the FERC for stranded costs based on the Commission's February 28, 1997 restructuring order for CVEC.

II. POSITIONS OF THE PARTIES AND STAFF

A. CVEC

CVEC proposes to increase its currently effective FAC rate from $0.0059 per kWh to $0.0072 per kWh and to increase its PPCA rate from its Interim PPCA rate of $0.0023 per kWh to $0.0133 per kWh effective on all bills rendered on or after January 1, 1998. The increase in the FAC rate would result in an annual increase in overall revenues to CVEC of $219,554 or 1.3%. The PPCA increase would result in an increase to CVEC's revenues of 11.0% or $1,857,768 on an annual basis.

CVEC's 1998 FAC rate is based on forecasted 1998 RS-2 of $2,987,348 and SPP energy costs of $4,202,800. Adjustments for interest, franchise tax and the over collection from 1997 result in a net estimated energy cost for 1998 of $7,097,667. Base energy revenues of $5,876,961 are subtracted from the $7,097,667 forecasted net energy costs to reflect the energy costs, $1,220,706, to be recovered through the FAC. Those costs are then divided by the forecasted retail sales of 168,888,000 kWh to derive a FAC rate of $0.0072 per kWh for all bills rendered in 1998. CVEC points out that the FAC sales and revenues are neutralized for the New Hampshire Retail Pilot program.

The increase in the FAC rate for 1998 is due to higher RS-2 energy charges which CVEC purchases from its parent company, CVPS, and from lower expected retail

sales and higher costs from the New Hampshire/Vermont Solid Waste Project, a QF located in Claremont, New Hampshire which sells all of its output to CVEC at Commission approved long-term avoided cost rates. The higher projected FAC costs for 1998 are offset by $154,953, the over collection in the FAC expected at the end of 1997 which are $144,741 greater than was forecasted in the 1997 FAC filing. The effect of the proposed FAC rate increase would be to increase a residential customer's monthly bill by $0.66, assuming 500 kWh of electricity usage.

The PPCA increase is calculated by adding the estimated 1998 RS-2 costs and the SPP capacity costs, $9,024,008 and $36,300, respectively, removing the effects of the New Hampshire Pilot program, adding interest and franchise tax to arrive at a total 1998 PPCA cost of $9,114,185. The 1997 PPCA under-collection of $275,285 is added for a net total of $9,389,470. Base capacity revenues of $7,248,765 are then subtracted to yield the 1998 estimated PPCA costs of $2,239,812 which is divided by estimated 1998 retail sales of 168,888,000 to derive the PPCA rate of $0.0133 per kWh.

The PPCA increase reflects an expected under-collection of 1997 PPCA costs of $275,285 due to increased purchased capacity costs of CVPS which are passed on to CVEC, increased production costs of CVPS-owned generation, slightly increased transmission costs and the reflection that the actual 1996 PPCA over collection was $166,878 less than forecasted.

The under-collection is added to the PPCA costs CVEC expects to incur in 1998. Those costs include an

increase in the RS-2 capacity costs of $281,273. The increased costs are caused by higher net purchased capacity costs of $147,000, higher production capacity and transmission allocation factors result in a $66,000 increase for CVEC, increased costs for CVPS-owned production results in a $36,000 increase for CVEC and transmission related costs result in approximately $57,000 of increased PPCA costs. The Company points out that most of the increase in the PPCA is due to lower revenues in 1997 as a result of refunds for over-collections and that only 4% of the 11% increase is a result of cost increases.

In a letter dated December 23, 1997, CVEC revised its sales forecast for 1998 upward by 1.7% or 2,881,000 kWh. The revised sales forecast results in a slight decrease to the FAC and PPCA rates originally proposed on November 25, 1997. The FAC would decrease to $0.0071 per kWh, a $0.0001 per kWh change, and the PPCA would drop by $0.0003 per kWh to $0.0130 per kWh.

Concerning CVEC's purchases from its parent company, CVPS, under FERC approved wholesale rates, CVEC argues that this proceeding should not address the issues related to CVEC's FAC and PPCA rates that were raised in the City of Claremont's *Petition for a Reduction in Electric Rates*. CVEC believes the issues belong in DR 96-150, the generic docket on New Hampshire electric restructuring. To address them in this proceeding would be needlessly duplicative in CVEC's opinion. CVEC also believes the City of Claremont's Petition is premature in that the Commission's directive to terminate the RS-2 contract is subject to a pending motion for rehearing and is therefore not yet final. During the hearing, CVEC stated that if market-based rates were the only costs

allowed to be recovered by CVEC and CVPS continued to bill and receive payment from CVEC under the RS-2 contract, CVEC would not recover approximately $5-$6 million of RS-2 costs and would be in default of its financing agreements.

By letter dated December 19, 1997, CVEC outlined a number of financial and accounting implications if the Commission were to order CVEC to exercise its termination provision of the RS-2 power contract and impose market based ratemaking. CVEC continues to believe that DR 96-150 is the proper docket to address these issues and requests that the Commission fully consider the financial and accounting effects of its decision on CVEC before rendering a decision. CVEC also seeks to meet with Staff and other interested parties to discuss the effects of terminating the RS-2 contract.

B. **The City of Claremont**

Claremont's complaint against CVEC argues, among other things, that CVEC's rates are unreasonable inasmuch as CVEC should have terminated its wholesale power contract with its parent, CVPS. In support of its complaint, Claremont noted that in Docket DR 96-392, a CVEC Fuel and Purchased Power Adjustment Charge proceeding, the Commission addressed a number of wholesale power related issues raised by the Office of Consumer Advocate and the Commission Staff. Among the issues addressed in that proceeding was whether CVEC, a wholly owned subsidiary of CVPS, had satisfied, in accordance with Commission Order No. 22,469, "its obligation to assess the prospective benefits and costs of

giving termination notice to CVPS for wholesale service." Claremont contends that the Commission found that CVEC had not satisfied this obligation and that CVEC had an obligation to continually assess how best to bring electric service to its customers at the lowest cost. Claremont further contends that, although the Commission recognized that CVEC had not assessed the opportunity for lowering its costs and retail prices by giving termination notice to CVPS, it found that such wholesale power purchase obligations could be better addressed in DR 96-150, the generic docket on electric industry restructuring. Claremont states that the Commission made a finding in DR 96-150, Order No. 22,509 dated February 28, 1997, that CVEC should have terminated its wholesale power purchase contract with CVPS when RSA 374-F was passed on May 21, 1996 and that its failure to do so was imprudent. Under the wholesale power purchase contract with CVPS, CVEC may terminate service at the end of a service year, provided it has given written notice of termination prior to the beginning of that service year. In Claremont's opinion, if CVEC had given written notice of termination to CVPS when RSA 374-F was passed, its obligations to purchase power for CVPS would end effective January 1, 1998.

At the hearing on December 17, 1997, Claremont noted that New Hampshire Electric Cooperative, Inc. (NHEC) provided termination notice to CVPS in March 1994 and exercised its 1-year right to terminate its wholesale purchased power contract with CVPS. One year later, CVPS won the bid to provide power to NHEC at a considerably lower cost. Claremont also stated that NHEC

did not incur stranded cost charges as a result of exercising its right to terminate the wholesale purchased power contract. Claremont provided evidence at the hearing that it believes supports its contention that the cost of power purchased from CVPS is above the wholesale market value for power. For support, Claremont compared CVPS's RS-2 rate of roughly $84 per MWH with 1998 estimated market prices for power as provided in DR 96-150 by PSNH of roughly $38 per MWH and the La Capra estimate for 1998 of roughly $41 per MWH. Under questioning at the hearing, Mr. Watts admitted that $50 per MWH would be a reasonable wholesale market price for electricity.

Claremont believes that, based on the above, it would be unlawful to allow CVEC to continue to recover such imprudently incurred above-market costs from its ratepayers after December 31, 1997. For support, Claremont cites RSA 378:7 and RSA 378:28. Claremont also believes that the Commission has the necessary authority to disallow recovery of above market costs arising from a wholesale power purchase contract, even though the contract itself may be subject to regulation by the Federal Energy Regulatory Commission.

Claremont requests that the Commission schedule a hearing pursuant to RSA 378:7 and rule that: CVEC's current rates are unjust and unreasonable; the cost of power purchased by CVEC from CVPS is above the wholesale market value for that power; and, CVEC is not entitled to recover from its ratepayers the above-market cost of power it purchases from CVPS after December 31, 1997.

C. Office of Consumer Advocate

The OCA supported the City of Claremont's proposal to either reduce the level of payment from CVEC to CVPS, thereby affecting shareholders of CVPS or to allow CVEC to place into rates a lower rate than the RS-2 rate, but higher than market-based rates in order to avoid a CVEC bankruptcy.

D. Staff

Staff did not file testimony, but questioned CVEC on the sales forecast, the treatment of Pilot program costs in the FAC and PPCA rates and the costs included in the RS-2 contract. Staff also questioned CVEC concerning the CVPS conditional notice to terminate the RS-2 contract filed at the FERC and its related request to obtain stranded cost recovery.

III. COMMISSION ANALYSIS

We have reviewed the testimony, transcripts and exhibits in this proceeding, including the post-hearing submittals by CVEC and the City of Claremont. Based on our review of the record, we find CVEC has acted imprudently by not terminating the RS-2 wholesale contract between CVEC and its parent company, CVPS. We make this finding separate from any determination in the electric utility restructuring docket, DR 96-150. The issues before us relate to one of the fundamental principles of regulation, the provision of safe and reliable service at just and reasonable rates. Based on the record, and in disregard for the concerns we have raised previously on

this issue, *See*, Order No. 22,509 (February 28, 1997) 71 NHPUC 145, 148 (1986), it is clear that the contractual relationship between the parent company and the affiliate was continued for the benefit of the shareholders of CVPS and that the ratepayers of CVEC received little to no consideration in the decision-making process of CVPS. Services are provided to CVEC through a service contract with CVPS. CVEC's witness, Mr. Frankiewicz, testified that the analysis done on the termination of the RS-2 contract was done strictly from the perspective of the consolidated company. It would appear that termination was not contemplated, even in light of NHEC's 1994 termination notice of its power contract with CVPS, due to the conflict of interest we noted as far back as 1986.

We will direct CVEC to bill its existing FAC and PPCA rates to customers pending the outcome of a hearing on the rates that would have resulted from an appropriate market-based wholesale rate which would have been available no later than January 1, 1998 if CVEC had acted prudently in its purchased power decisions. Based on CVEC's oral testimony and the letter of December 19, 1997, in which it raised a number of serious financial and accounting implications associated with the termination of the RS-2 contract or the non-recovery of above market power costs, we believe CVEC and the other parties and Staff should be afforded the opportunity to present evidence concerning those implications. Prior to the hearing, we believe that CVEC's request to meet with the parties and Staff to discuss these matters should be granted. We urge CVEC, the City of Claremont, OCA and Staff to meet at the earliest possible date to explore these issues before the hearing.

Based upon the foregoing, it is hereby

ORDERED, that CVEC is directed to bill its current FAC and PPCA rates effective January 1, 1998, on a temporary basis pending a hearing to determine: 1) the appropriate proxy for a market price that CVEC could have obtained if it had terminated its RS-2 wholesale contract with CVPS; 2) the implications of only allowing CVEC to pass on to customers that market price; and, 3) whether the Commission's final determination on the FAC and PPCA rates should be reconciled back to January 1, 1998 or some other date; and it is

FURTHER ORDERED, that tariff pages 10th Revised Page 50 and 7th Revised Page 51, the rates paid to Qualifying Facilities under Rate E, are APPROVED and that all other proposed tariff pages are SUSPENDED pending the outcome of the hearing on the above mentioned issues; and it is

FURTHER ORDERED, that CVEC's Motion to Dismiss is DENIED; and it is

FURTHER ORDERED, that a hearing on the above mentioned issues be heard on January 28, 1998 at 10:00 a.m.

By order of the Public Utilities Commission of New Hampshire this thirty-first day of December 1997.

/s/ Douglas L. Patch
Douglas L. Patch
Chairman

/s/ Bruce B. Ellsworth
Bruce B. Ellsworth
Commissioner

/s/ Susan S. Geiger
Susan S. Geiger
Commissioner

Attested by:

/s/ Thomas B. Getz
Thomas B. Getz
Executive Director and Secretary

Minutes
Commission Meeting
February 23, 1998

[p. 8] Commissioner Ellsworth hopes that the independent telephone companies can develop a plan that would provide the same service that the Commission is now approving for Bell Atlantic. On the assumption that they can do so, the Commission recommends that the independent telephone companies and Bell Atlantic provide to the Commission the earliest date that the entire state could be flash-cut. Commissioner Ellsworth noted that, in his opinion, that approach would be somewhat tenuous and he would be amenable to an alternative plan that would provide a piece-meal provision of service so that customers who can get that service soon would not be delayed while the later customers get completed.

A motion was made by Commissioner Ellsworth, seconded by Commissioner Geiger and unanimously approved to adopt the Commission's deliberations articulated above by Commissioner Ellsworth.

9. DR 97-241; Connecticut Valley Electric Company (CVEC) (Fuel Adjustment Clause (FAC) and Purchased Power Cost Adjustment (PPCA))

Chairman Patch noted that the Commission issued Order No. 22,815 (December 31, 1997) relative to CVEC's proposed FAC and PPCA and Short-Term Energy Purchase Rate. In that order the Commission rejected CVEC's proposed rate on the ground that its management had acted

imprudently by failing to terminate its wholesale purchase power contract with Central Vermont Public Service Company (CVPS). In the same order, the Commission froze CVEC's rates at the 1997 level until it completed an evidentiary hearing on January 28, 1998 to consider three issues: 1) the appropriate proxy for a market price that CVEC could have obtained if it had terminated its RS-2 wholesale contract with CVPS; 2) the implications of only allowing CVEC to pass on to customers that market price; and 3) whether the Commission's final determination on the FAC and PPCA rates should be reconciled back to January 1, 1998 or some other date.

On January 12, 1998, CVEC filed a Motion for Rehearing asking the Commission to rehear Order No. 22,815. The Commission decided to include the issue of prudence in addition to the above-mentioned issues at the January 28th hearing. Chairman Patch noted that three days of hearings took place (January 28, February 10 and 11, 1998) and subsequent briefs were submitted. Based on the testimony presented and the briefs, Chairman Patch noted that he would move to resolve the issues as follows.

First, Chairman Patch cited provisions of *Appeal of Sinclair Machine Products, Inc.*, 126 N.H. 822 (1985). He noted that the New Hampshire Supreme Court indicated that the Commission at the time was abdicating its responsibility for approving only those rates it finds to be just and reasonable because it had not looked more closely at the rates that CVPS was charging to CVEC which CVEC ultimately had to pass on to its customers. Chairman Patch believes that this is very important to the decision

that the Commission is being asked to make in this docket. He noted that on page 834 of the *Sinclair* decision the Court stated that "the PUC is not preempted from determining the reasonableness or prudency of CVEC's initial purchase of Central Vermont power or its continued participation under this rate schedule." The Court went on to say that: "The burden of showing the reasonableness of CVEC's participation in this agreement rests with CVEC." The Court further stated that: "The wholesale rate must be justified by the utility as the product of reasonable efforts to secure the lowest cost in light of appropriate alternatives available to the company."

Chairman Patch noted that keeping the *Sinclair* decision in mind, as well as the issues that the Commission indicated it would consider during the January 28th and subsequent hearing days, he does not believe CVEC has been persuasive in convincing the Commission that it has acted prudently in this instance. He continues to believe that CVEC acted imprudently and it has not done what the New Hampshire Supreme Court has told the Commission that CVEC has to do. Chairman Patch believes that the Commission would be abdicating its responsibility as regulators if it were to determine otherwise. He believes that the evidence shows that if CVEC had exercised the one-year termination provision in its contract with CVPS, the rates that ultimately would have been passed on to customers would have been significantly lower. Chairman Patch noted that under a conservative estimate of what those rates would have been (such as, 4¢ per kWh) the customers would have saved significantly over what they are currently paying. Chairman Patch recommended

that the Commission determine, based on the testimony presented, that the appropriate market proxy rate be 4¢ per kWh, a rate which is very conservative.

In terms of reconciliation, Chairman Patch believes it is appropriate to reconcile the rates to January 1, 1998. In doing so, he believes that CVEC has failed to meet its burden of convincing the Commission that it is entitled to recover the costs of the RS-2 contract and that CVEC failed to meet its burden of convincing the Commission that it is entitled to the stranded costs that it believes it is entitled to from the Federal Energy Regulatory Commission. Chairman Patch does not believe CVEC has been persuasive on this particular issue and he ultimately believes that it is imprudent for CVEC not to have exercised the termination provision in the wholesale contract. In addition, Chairman Patch noted that he is not convinced that the financial implications are as severe as CVEC has suggested. He believes there are ways for CVEC to address these financial implications; in fact, there is some evidence that suggests that CVEC has taken a number of steps to do that. Chairman Patch believes that there is a way for CVEC to manage any financial implications if it wants to avoid being put into bankruptcy. He believes that the financial implications are ones that can be managed and controlled.

Lastly, Chairman Patch noted that the Commission recognizes the fact that there is a legal issue here that CVEC feels very strongly about and the Commission feels very strongly that it does not want to abdicate its responsibility and believes that CVEC is imprudent for not having exercised the termination provision of its contract with CVPS. In light of this legal issue and in recognition

of the fact that the Commission's decision will have a revenue impact on CVEC, Chairman Patch noted that he would move the following: 1) that the Commission stay any decrease in rates over the 1997 level so that CVEC can continue to charge the rates it is currently charging; and, 2) that the Commission stay any decrease in rates to reflect what the Commission believes is the appropriate market proxy rate (4¢ per kWh) pending an appeal to the New Hampshire Supreme Court provided that CVEC shows satisfactory indication to the Commission that there is financial assurance in place, including but not limited to a bond that would cover the difference between the current rates and the reduced market proxy rates, to assure that ratepayers are protected retroactive to January 1, 1998. In other words, the Commission would agree to stay any decrease in rates pending an appeal to the New Hampshire Supreme Court providing that CVEC could show the Commission that ratepayers are protected through some form of financial assurance. In doing so, Chairman Patch noted that he was attempting to find a reasonable middle ground to balance both CVEC's and the customers' interests until the issues that are at stake can be resolved.

A motion was made by Chairman Patch, seconded by Commissioner Ellsworth and unanimously approved to adopt the Commission's deliberations articulated above by Chairman Patch.

10. New Business

A. DE 97-171; Bell Atlantic (Petition for Approval of Statement of Generally Available Terms (SGAT))

Chairman Patch noted that Staff's memorandum of February 23, 1998 indicates that Staff, Bell Atlantic and AT&T have agreed to adjust the procedural schedule in this docket. Among other changes, the proposed revised procedural schedule indicates that testimony is due from the non-Bell Atlantic parties on March 9th rather than February 27th and the hearing dates are May 19, 20 and 21.

DR 96-150

STATEWIDE ELECTRIC UTILITY RESTRUCTURING PLAN

Order *Nisi* Vacating Portions of Interim Stranded Cost Orders Related to Wholesale Requirements Contracts

ORDER NO. 22,986

July 22, 1998

I. BACKGROUND

By Order No. 22,514 (February 28, 1997), the New Hampshire Public Utilities Commission (Commission) issued a Statewide Electric Utility Restructuring Plan (Plan) pursuant to RSA 374-F.[1] On the same date, the Commission established interim stranded cost charges (ISC charges) for each jurisdictional utility consistent with the legal and policy decisions announced in the Plan and the factual circumstances of each utility.[2]

The Plan included a legal analysis addressing, *inter alia*, claims by electric utilities that the Federal Power Act (FPA) requires the Commission to set stranded cost charges which are designed to recover all costs associated with wholesale purchase power contracts approved by the Federal Energy Regulatory Commission (FERC).[3] The Commission determined that its jurisdiction had to be decided on a case-by-case basis, but that the FPA did not

---

[1] RSA 374-F directed the Commission to develop a statewide restructuring plan no later than February 28, 1997.

[2] ISC charges for CVEC, Unitil and GSEC were set by Order Nos. 22,509, 22,510 and 22,511, respectively.

[3] *See* Plan at 25-51.

inherently prevent the Commission from disallowing the recovery of costs under certain circumstances.

The ISC orders pertaining to CVEC, GSEC and Unitil directed each of those companies to notify their affiliated wholesale requirements suppliers of their intent to terminate the foregoing contracts. The Commission allowed GSEC and Unitil to fully recover the above-market portion of their wholesale power costs on an interim basis, but in the case of CVEC disallowed recovery of costs related to the requirements contract with its parent supplier, Central Vermont Public Service Corporation (CVPS).[4] The Commission noted that CVEC should have provided notice to terminate the contract pursuant to its right to do so – and that by so doing, it would have fully mitigated the wholesale power costs from CVPS as of January 1, 1988, the date the ISC charge was expected to have gone into effect.

In Order No. 22,875 (March 20, 1998), the rehearing order on restructuring, the Commission affirmed its decision to address on a case-by-case basis the above-described jurisdictional preemption claims by utilities. The Commission noted that its order did not bar utilities from recovering unmitigatable costs associated with purchased power obligations; rather, the Commission decided to defer making final determinations on such questions until examining utility-specific claims on a case-by-case basis. The Commission also reiterated that utilities were expected to take all reasonable measures to

---

[4] The Commission did, however, allow full recovery of costs incurred under QF contracts with CVEC.

mitigate or avoid incurring costs associated with existing wholesale contracts.[5]

II. DISCUSSION

Recently, the FERC issued a decision concerning a dispute between PSNH and NHEC which affects a utility's continuing purchase obligation under a wholesale requirements contract[6]. The fundamental issue addressed by FERC in that decision was whether NHEC must continue to pay for power to the degree needed to meet the energy needs of all of its retail customers – even after customers begin to purchase power from alternative suppliers pursuant to RSA 374-F. The FERC determined that the Amended Partial Requirements Agreement (APRA) obligates NHEC to purchase from PSNH only as much power as NHEC needs to serve those retail customers who remain its customers. The FERC also rejected an alternative request by PSNH for wholesale stranded cost recovery under Order No. 888.[7]

We recognize that FERC's decision was limited to the PSNH-NHEC requirements contract; however, the decision has obvious implications for other New Hampshire electric utilities with similar requirements contracts. For instance, in the absence of a contractual obligation to the

---

[5] In the same rehearing order the Commission affirmed the ISC orders for CVEC, GSEC and Unitil.

[6] *See* Public Service Company of New Hampshire, 83 FERC 61,223 (May 29, 1998).

[7] *Ibid.*

contrary, the decision suggests that wholesale requirements customers are contractually obligated to purchase power only to the extent needed to serve their retail power supply customers. This could mean that a wholesale requirements customer (such as NHEC, GSEC, Unitil or CVEC) may have no stranded cost liability to its wholesale supplier when retail customers of the requirements customer purchase power from alternative suppliers. The decision also implies that it is unnecessary for utilities to terminate their requirements contracts in order to implement retail access in a manner that fully mitigates potential stranded costs as required by RSA 374-F. Accordingly, we vacate our prior directives to GSEC[8], Unitil and CVEC to provide notice of termination consistent with the terms of their wholesale requirements contracts. However, we reiterate that utilities have a statutory obligation to take all reasonable measures to mitigate stranded costs.

Based upon the foregoing and for good cause shown, it is hereby

---

[8] We note that vacating our ISC order for GSEC should have no effect on GSEC or New England Power Company, its affiliated wholesale power provider, based on our recent approval of GSEC's letter of acceptance to our modifications to the Offer of Settlement in Docket No. DR 98-012. Effective July 1, 1998, the retail access date, NEP ceased providing GSEC all requirements service under its wholesale power tariff, FERC Electric Tariff, Original Volume No. 1, and now provides GSEC with service in accordance with Appendix 1 to NEP's and GSEC's Amendment to Service Agreement, which was filed at the FERC on February 3, 1998, Docket No. ER98-2023-000. The FERC accepted the filing and Appendix 1 on April 28, 1998.

ORDERED *NISI*, that the directive to CVEC to provide notice to terminate in Order No. 22,509 is vacated unless the Commission orders otherwise; and it is

ORDERED *NISI*, that the directive to Unitil to provide notice to terminate in Order No. 22,510 is vacated unless the Commission orders otherwise; and it is

ORDERED *NISI*, that the directive to GSEC to provide notice to terminate in Order No. 22,511 is vacated unless the Commission orders otherwise; and it is

FURTHER ORDERED, that the foregoing discussion supplements the Commission's prior legal analysis in the Plan and in Order No. 22,875; and it is

FURTHER ORDERED, that the Executive Director and Secretary shall provide a copy of this Order *Nisi* to all parties and persons on the service list in this docket; and it is

FURTHER ORDERED, that any interested person may submit their comments or file a written request for a hearing on this matter before the Commission no later than July 31, 1998;

FURTHER ORDERED, that this Order *Nisi* shall be effective on July 22, 1998, unless the Commission provides otherwise in a supplemental order.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of July, 1998.

/s/ Douglas L. Patch (CR)
Douglas L. Patch
Chairman

/s/ Bruce B. Ellsworth
Bruce B. Ellsworth
Commissioner

/s/ Susan S. Geiger
Susan S. Geiger
Commissioner

Attested by:

/s/ Thomas B. Getz
Thomas B. Getz
Executive Director and Secretary

Central Vermont Public Service Corporation	First Revised Sheet No. 1
Rate Schedule FERC No. 135	Effective: January 1, 1986

RATE RS-2 FOR RESERVE SYSTEM CAPACITY SERVICE BY CENTRAL VERMONT PUBLIC SERVICE CORPORATION TO CONNECTICUT VALLEY ELECTRIC COMPANY INC.

A. Obligation of The Parties

Connecticut Valley Electric Company Inc. ("the Customer"), by commencing to take reserve system capacity service from Central Vermont Public Service Corporation ("the Company"), agrees to take and pay for, and the Company agrees to furnish the service, subject to the terms and conditions of this rate schedule as it may be in effect from time to time subject to the provisions of Paragraph F hereof and to the action of the regulatory Commission having jurisdiction.

B. Scope of Service

The Company shall provide electricity to meet the Customer's entire electric service requirements with the exception of capacity and/or energy which the Customer may purchase from non-utility sources located within its service area.

C. Effect On Other Agreements

This rate schedule supersedes all previous service agreements and rate schedules between the Company and the Customer for wholesale electric service; provided

that the Company and the Customer shall continue to remain liable to one another for all sums of money due under the terms of any such previous service agreement and rate schedule; and provided further that nothing herein is intended to relieve the Company

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	First Revised Sheet No. 2 Effective: January 1, 1986

or the Customer from any obligations regarding the termination of service under such rate schedule or service agreement.

D. Periods of Service

The initial service year hereunder shall commence on the effective date of this rate schedule and shall terminate on December 31 of that year. Each successive service year shall coincide with the calendar year.

E. Termination

Service under this rate schedule may be terminated at any time if both the Company and the Customer agree to the termination. If there is no agreement, service may be terminated at the end of a service year if the party seeking termination has given written notice of termination prior to the beginning of that service year.

F. Amendment

The Company shall have the right at any time to amend this rate schedule by furnishing an appropriate statement of such amendment to the Customer and filing the same with the Federal Energy Regulatory Commission (or such other regulatory agency as may have jurisdiction in the premises).

Nothing contained herein shall be construed as affecting in any way the right of the party furnishing service under this rate schedule to unilaterally make application to the Federal Energy Regulatory Commission for a change in rates under Section 205 of the Federal Power Act and pursuant to the Commission's Rules and Regulations promulgated thereunder.

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	First Revised Sheet No. 3 Effective: January 1, 1986

G. Monthly Charges

The Customer shall pay the following monthly charges:

(i) a capacity charge for generation and transmission service which shall be computed as one-twelfth of the Customer's portion of the Company's annual capacity cost. The method of determining the annual capacity cost is set forth in Paragraph P.

(ii) a charge of fifteen cents (15¢) per KVAR of excess reactive demand per delivery point. At each delivery point, the KVAR of excess reactive demand shall be

any excess of the greatest sixty minute KVAR measured during the current month over one-half of the greatest sixty minute KW measured during the same period.

(iii) a charge for the Company's cost of owning and maintaining delivery points. The method of determining those monthly charges is as set forth in Paragraph P.

(iv) a charge for transformation of power below 34 KV which shall be computed at 1/12 of an annual rate in $/KW times the Customer's monthly service requirement at each delivery point. The method of determining the annual rate is set forth in Paragraph P. The Customer's service requirement for transformation of power below 34 KV for a month shall be the greater of either (1) the kilowatts metered at each of the Customer's delivery points below 34 KV during the 60-minute period of the customer's greatest energy use at each such delivery point during the month which amounts shall be divided by a loss adjustment factor of .970 or, (2) the largest service requirement determined in accordance with clause (i) for the

preceding months of November, December, January, February and March.

(v) a customer charge consisting of a direct assignment of regulatory commission expense, which may be identified as pertaining to the Customer within the service year.

(vi) an energy charge for each KWH, which shall be divided by a loss adjustment factor of .965 for deliveries at 34 KV or higher and of .935 for deliveries at 12.5 KV or less, sold during that month shall be computed in accordance with the following formula: Unit Cost ($/KWH) = (I + J – M) ÷ (K + L – N).

In the said formula for the current month:

I($) = The energy cost portion of the cost of Purchased Power included in FERC Account 555, excluding costs associated with the cost of power generated by the St. Lawrence and Niagara projects.

J($) = The cost of fuel consumed by Company-owned and/or operated generating equipment as defined in FERC Account Nos. 501, 518, and 547.

M($) = Revenues received from sales to NEPEX plus the cost of energy used to supply any of the Company's unit sales and short-term system capacity and energy sales.

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	First Revised Sheet No. 5 Effective: January 1, 1986

K(KWH)= Total KWH of energy purchased outside of the Company's system during the current month as delivered to the Company's transmission system. Such KWH's shall be those associated with Purchased Power Account No. 555 excluding KWH's associated with the purchase of power generated by the St. Lawrence and Niagara projects.

L(KWH)= Net KWH produced by Company-owned generation.

N(KWH)= KWH sold by the Company as unit sales, as short-term system capacity and energy sales, and as sales to NEPEX.

H. Delivery Of Power

The Company shall be responsible for delivering or arranging the delivery of the electricity sold hereunder to the Customer at the delivery points hereinafter identified:

Points of Delivery	Voltage
Bath	under 12.5 KV
Cornish	12.5 KV
Coy	46 KV
Haverhill	12.5 KV
Joy	46 KV
Lafayette Street	46 KV
Lyme	12.5 KV
Maple Avenue	46 KV
Orford	under 12.5 KV
Piermont	12.5 KV
Temple Eastex	46 KV
Sullivan	46 KV

I. Rights Of Way

The obligations of the Company and the Customer are subject to and conditioned upon securing and retaining all rights-of-way, franchises, locations, permits and other rights and approvals necessary in order to permit

service hereunder, and each party agrees to use its best efforts to secure and retain all such rights-of-way, franchises and other rights and approvals.

J. Continuity Of Service

The Company shall not be responsible for any failure to supply electric service, nor for interruption, reversal or abnormal voltage of the supply, if such failure, interruption, reversal or abnormal voltage is without willful default or gross negligence on its part. Whenever the integrity of the Company's system or the supply of electricity is threatened by conditions on its system or on the systems with which it is directly or indirectly interconnected, or whenever it is necessary or desirable to aid in the restoration of service, the Company may, in its sole judgment, curtail or interrupt electric service or reduce voltage to the Customer and such curtailment, interruption or reduction shall not constitute willful default by the Company. When the Company interrupts or varies electric service to make repairs to or changes in its facilities, such action shall be taken upon reasonable notice to the Customer, or without notice in an emergency when such notification would be impracticable or would prolong a dangerous situation.

K. Metering

Metering equipment utilized at delivery points for billing of all sales of capacity and energy made by the Company shall be supplied, installed, wired, owned and maintained, calibrated and scaled by the Company. Such meters shall be of a type selected by the Company.

When metering is at a point other than the delivery point, the metering equipment shall be compensated to register values which would have been recorded if the equipment had been located at the delivery point.

The accuracy of the metering equipment shall be verified by proper test at any time upon reasonable notice given by either of the parties to the other, and each party shall be entitled to have a representative present at such verification.

The work of testing and adjusting any meter for accuracy shall be performed by and at the expense of the Company, provided that such test is not called for by the other party more often than once in twelve months. If either party shall require more than one verification of any meter in any twelve-month period, and the meter proves to be accurate within two (2) percent up or down, the additional verification shall be at the expense of the party requesting it.

If such equipment is found to be inaccurate by more than two (2) percent up or down, the equipment shall be made accurate and the meter readings for the period of inaccuracy shall be adjusted to correct such inaccuracies as far as the same can be reasonably ascertained, but no adjustment prior to the beginning

of the second preceding month shall be made except by agreement of the parties.

In the event that the Company's meters fail to register properly during any billing period, the demand and energy quantities will be estimated by the Company from the best available data.

If requested, the Customer agrees to supply, free of cost, at each point of delivery to its system a suitable location for the installation of the Company's metering equipment. Such location shall be by agreement between the Company and the Customer. The Customer shall maintain electric isolation of its system served from each point of delivery.

L. Use Of Service

The Customer shall exercise diligence to use the electric service furnished under this tariff with a view to securing efficiency of the Company's apparatus and system in keeping with generally accepted good operating standards, will maintain a power factor as near 90 percent lagging as practicable consistent with good engineering practice, will construct its distribution lines in accordance with specifications at least equal to those prescribed by the National Electrical Safety Code of the United States Bureau of Standards, will maintain its lines at all times in a safe operating condition, will operate lines in such

manner as not to interfere with the service of the Company to its customers, will coordinate with the Company maintenance which may adversely affect the operation of the Company's facilities, and will use electric service equally from the three phases as nearly as possible. If the Customer shall deem it necessary that voltage regulating equipment, including

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	Third Revised Sheet No. 9 Effective: January 1, 1986

but not limited to the structures and devices associated with such equipment, is required at any delivery point, such equipment shall be provided, owned and maintained by the Customer.

M. Liability

The Customer assumes all responsibility for electricity beyond the point of delivery and the Company shall not be liable for damages to the person or property of the customer or its employees or any other persons resulting from the use or presence of electricity beyond the point of delivery, except where damage shall have been occasioned by the negligence of the Company, its agents, or employees.

N. Access

The Customer gives all necessary permission to enable the agents of the Company to carry out the terms

of this tariff and construct and maintain its lines and circuits in and at all places required by the Company and owned, leased or controlled by the Customer. The Customer gives to the Company the right for its duly authorized agents and employees to enter the premises of the Customer at all reasonable times for the purpose of reading meters, keeping in repair or removing its property or inspecting its work incident to rendering service under this tariff.

O. Billings and Payment

1. All meters shall be read and bills rendered monthly. If the Company is unable to obtain the reading of a meter, it may estimate the reading.

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	Third Revised Sheet No. 10 Effective: January 1, 1989

2. All bills shall be due and payable upon presentation. In the event of a dispute as to the amount of any bill, the Customer will notify the Company of the amount in dispute and the Customer will pay to the Company the total bill including the disputed amount. The Company shall refund, with simple interest at the rate described in Paragraph 0-3, any portion of the disputed amount ultimately found to be improper.

3. When all or part of any bill shall remain unpaid for more than thirty (30) days from the date of the Company's bill, which shall be the date of mailing, interest at the then prime rate offered by The First National Bank of

Boston, its successors or assigns, during the period of such non-payment shall accrue to the Company from and after the thirtieth (30th) day from the date of said bill and be payable to the Company.

4. In the event adequate billing data are not available bills may be rendered on an estimated basis subject to prompt corrective adjustment when such data are received.

5. The Customer shall not have the right to challenge any bill, invoice or statement, nor bring any court or administrative action of any kind questioning the accuracy of the same after a period of twelve (12) months from the date it is rendered. In the case of a bill, invoice or statement containing estimates, the Customer shall not have the right to challenge its accuracy after a period of 12 months from the date it is adjusted to reflect the actual amounts due. The Customer's rights hereunder relate to the mathematical accuracy of the billing computation provided to the Customer with its bill and do not relate to the compliance of the rates and, charges with the rate schedule or to the justness and reasonableness of the cost of service data, which subjects are covered by Paragraph Q(4).

P. Capacity Charge Formula

1. The service year Capacity Charge for generation and transmission service shall be computed in accordance with the following formula:

Cost ($/Year) = [(A) (C + D + E + H) + (G) (F)].

In the said formula for the service year:

A =A(cc) + A(c). A(cc) = Company capacity for the Customer's reserve-required load, which is the difference between total Customer capacity and capacity specifically assignable to the Customer. Total Customer capacity is obtained by multiplying the sum of (1) the Company's capacity for reserve-required load and (2) capacity specifically assignable to the Customer by B which is the 70/30 coincident reserve-required load allocation. A(c) = total net Company capacity, which is the sum of the Company's purchased capacity entitlements, plus owned-generation capacity, minus unit sales of owned-generation capacity, minus short-term sales of system capacity, minus capacity associated with power generated by the St. Lawrence and Niagara projects.

$$B = \frac{[.70\ (A(p)) + .30\ (A(a))].}{[.70\ (B(p)) + .30\ (B(a))].} +$$

A(p) = the Customer's load on the Company's system at the time of the Company's annual transmission peak, G(p), divided by loss adjustment factors of .965 and .935 for deliveries at 34 KV or higher and at 12.5 KV

or lower, respectively. A(a) = the average of the 12 monthly equivalents of A(p). B(p) = the Company's reserve-required load at the time of the Company's annual transmission peak. B(a) = the average of the 12 monthly equivalents of B(p).

C($) =The actual fixed charge portion of the cost of Purchased Power as defined in FERC Account No. 555, excluding such costs associated with the cost of power generated by the St. Lawrence and Niagara projects, and excluding the difference between the revenues from short-term system capacity and energy sales and the cost of energy used to supply such sales.

D($) =Transmission by Others as defined in FERC Account No. 565.

E($) =The fixed charges relating to the cost of Company-owned generation, less the difference between the revenues from unit sales and the cost of energy used to supply unit sales, and less revenues from other interruptible sales.

F($) =The fixed charges relating to the cost of Company-owned transmission, excluding Highgate transmission.

G =A(p) + G(p). G(p) = the maximum annual peak load on the Company's transmission system.

H($) =The fixed charges relating to the cost of Company-owned Highgate transmission.

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	Second Revised Sheet No. 13 Effective: January 1, 1986

2. For billing during the service year, the Company will employ estimated values for A through H. Following the conclusion of the Service Year, the Company shall recalculate the Annual Capacity Charge by substituting actual data for A through H. By May 31st following the end of the Service Year, the Company shall credit to the Customer the excess, if any, of revenue collections that were made pursuant to the aforesaid estimated values over the collections that would have been made pursuant to actual values, and the Company shall bill and the Customer shall pay the excess, if any, of the revenue collections that would have been made pursuant to the actual values for A through H over the collections that were made pursuant to the estimates for those values. Any credit for the excess of revenue collections shall be increased by interest which is to be computed and accrued in accordance with the Commission's regulations governing refunds by electric utilities to their customers.

3. In Paragraph P-1, the value for E shall be determined in accordance with the following formula: E = (Investment Base x Rate of Return) + Income Tax Allowance + Expenses.

(i) The investment base for the service year shall be derived from per book production data for the service year, except where per book data should be adjusted in order that an amount of capitalized AFDC be included relative to the amount of construction work in

progress included in the investment base in prior service years. It shall consist of the sum of:

(a) Per-book average gross production plant; plus

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	Second Revised Sheet No. 14 Effective: January 1, 1989

(b) Average general and intangible plant functionalized to production plant based on labor expense; plus

(c) An allowance for materials and supplies applicable to production plant; plus

(d) An allowance for cash working capital based on one-eighth of production operation and maintenance expense exclusive of fuel and purchased power expenses, one-fourteenth of purchased power and transmission by others expenses, and one-sixth of fuel expense; less

(e) The per-book average depreciation reserve for production plant and a portion of the average depreciation reserve for general plant allocated to the production functions on the basis of labor expense; less

(f) Average deferred income tax balances properly allocable to the plant included in (a) and (b) above consistent with FERC policy applicable to the service year functionalized on net plant ratios and labor

expense, respectively, except where specific functional assignment is appropriate; plus or less

(g) other average production related amounts which are recorded on the Company's books and related to the service hereunder, and which are to be added to or subtracted from

investment base consistent with FERC policy applicable to the service year.

As used in this clause (i), "average" is the average of the beginning and year-end balances unless a facility on which the Company has accrued AFDC enters service after the beginning of the service year in which case the (a) investment and the (e) and (g) related balances associated with such facility shall be based on an average of monthly balances.

(ii) The rate of return shall be determined on the basis of the following formula:

Cost of Capital = (DR x DI) + (PR x PD) + (CR x CE).

Where:

DR =Debt to total capitalization percentage which shall be the Company's debt to total capitalization. Debt includes first mortgage bonds and other long term debt less unamortized debt expense on the Company's books.

DI =Weighted average effective interest rate on all Company debt securities included in DR above.

PR =Preferred securities to total capitalization percentage which shall be deemed to be the Company's preferred to total capitalization.

PD =Weighted average effective dividend rate (cost to the Company at net proceeds) on all Company preferred securities included in PR above.

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	Fourth Revised Sheet No. 16 Effective: January 1, 1993

CR =Common to total capitalization percentage which shall be the Company's common equity to total capitalization.

CE =Return on common equity. Which shall be 11.5% for the 1992 service year and 10.9% for subsequent service years.

DR + PR + CR shall equal one hundred (100) percent. Each of the above determinations shall be based on the Company's per book capitalization at the end of the service year.

(iii) The income tax allowance will be calculated using the rate of return developed in accordance with Subparagraph P-3 (ii), the Company's service year per book income tax deductions and adjustments allocable to production facilities, the effective tax rates under Federal and state income tax statutes for the service year,

and credits including amortization of the investment tax credit allocable to production facilities. At no time shall the income tax allowance be deemed to be less than zero. The long-term debt interest expense tax deduction used in the calculation of taxable net income shall be determined by multiplying the weighted cost of debt employed in the rate of return calculation by the investment base.

(iv) Expenses shall consist of production related per book depreciation expense, operation and maintenance expense including administrative and general expense, and taxes other than income taxes for the service year; provided that the administrative and general expense shall exclude regulatory commission expense, the appropriate portion of which shall be charged to the Customer pursuant to Subparagraph G(v). Per book depreciation expense

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	First Revised Sheet No. 17 Effective: January 1, 1989

shall be adjusted in order to reflect any adjustment in investment base listed in Subparagraph 3(i) hereof. Administrative and general expense shall be allocated to the production function on the basis of labor expense. Plant related and labor related taxes other than income taxes shall be functionally assigned on the basis of net plant ratios and labor expense, respectively. The amortization of property losses resulting from the Company's sale of Seabrook I shall be $3,857,507 on an annual basis for twenty (20) years beginning June 1, 1987 and ending

May 31, 2007. Service year expenses shall also include such other production related amounts as are reported on the Company's books and which should be included in cost of service consistent with FERC policy applicable to the service year. The production expenses to be charged hereunder shall be those related to the service provided hereunder.

4. In Paragraph P-1, the value of F shall be determined in accordance with the following formula: F = (Investment Base x Rate of Return) + Income Tax Allowance + Expenses.

(i) The investment base for the service year shall be derived from per book transmission data, excluding per book Highgate transmission data, for the service year. It shall consist of the sum of the same items listed in subparagraph 3(i) except that the items shall be transmission related rather than production related.

(ii) The rate of return shall be determined on the basis of the formula set forth in subparagraph 3(ii).

(iii) The income tax allowance and expenses shall be calculated in accordance with subparagraphs 3(iii) and 3(iv), respectively, except that the items shall be transmission related.

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	Original Sheet No. 18 Effective: January 1, 1986

5. In Paragraph P-1, the value of H shall be determined in accordance with the following formula: H =

(Investment Base x Rate of Return) + Income Tax Allowance + Expenses.

(i) The investment base for the service year shall be derived from per book Highgate transmission data for the service year. It shall consist of the sum of the same items listed in subparagraph 3(i) except that the items shall be Highgate transmission related rather than production related.

(ii) The rate of return shall be determined on the basis of the formula set forth in subparagraph 3(ii).

(iii) The income tax allowance and expenses shall be calculated in accordance with subparagraphs 3(iii) and 3(iv), respectively, except that the items shall be Highgate transmission related.

6. Delivery point and transformation costs to 12.5 KV or less described in Subparagraphs G(iii) and G(iv) shall be developed on a basis which is consistent with the development of production and transmission costs as set forth in Paragraph P-3.

Q. Annual Reports Of Estimated And Actual Costs

1. On or before May 31st of each year, the Company will file with the Federal Energy Regulatory Commission a report showing the actual values for A through H and the development of the actual charges for the immediately preceding service year. The said report shall also indicate the difference between revenue collections for that service year on the estimated and actual bases.

Central Vermont Public Service Corporation	First Revised Sheet No. 19
Rate Schedule FERC No. 135	Effective: January 1, 1989

2. By December lst of each year, the Company will file with the Federal Energy Regulatory Commission a report showing the basis for estimated billing during the service year commencing on January 1. The Company may revise the said report by submitting changed data by December 15th of that year.

3. The Company will also submit such other information and data regarding the service and charges to the Customer as the Commission, or its Staff, may request on the review of the aforementioned reports. If at any time during the service year the Company concludes that the estimated charges are too high or too low, the Company may submit to the Commission a revised report for estimated billing to commence thirty days after the said submission and to apply for the balance of the service year.

4. The Commission may upon complaint of any interested party or upon its own motion initiate an investigation into whether the Company's rates and charges under the rate schedule are or have been just, reasonable and not unduly discriminatory and may in its final order:

(i) Change any provision of the rate schedule found to provide for unjust, unreasonable, or unduly discriminatory rates and charges under Section 206 of the Federal Power Act and order refunds with interest of amounts collected for service since the refund effective

date established under Section 206 in excess of the amounts that would have been collected under the provision as revised by the Commission;

(ii) Order adjustments, up or down, so that rates and charges are in compliance with the rate schedule; provided however, that refunds may not be required for periods earlier

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	First Revised Sheet No. 20 Effective: January 1, 1989

than five (5) years prior to the date of the Commission's order instituting the investigation.

If refunds are required under this paragraph, the Company will make them within thirty days of the Commission's order with interest at a rate to be determined in accordance with the provision(s) of the Commission's regulations under the Federal Power Act in effect at the time refunds are ordered. If upward adjustments are required pursuant to this paragraph, the Company will reflect such adjustments in the next rate submittal.

The Commission's authority under Paragraph Q(4)(ii) supersedes any limitations, express or implied, on such authority contained in any other section of the rate schedule.

R. **Refunds To The Company**

The Company shall credit to the Customer's billings hereunder the Customer's share of any refunds which the Company received from other utilities and which have been reflected in payments made by the Customer to the Company.

S. **Supravening Laws and Regulations** -

The obligations of the Company and the Customer hereunder are subject to any present and future Federal and State laws, regulations, orders or other requirements duly promulgated.

Central Vermont Public Service Corporation Rate Schedule FERC No. 135	First Revised Sheet No. 21 Effective: January 1, 1989

[This Page Intentionally Left Blank]

SUPPLEMENT NO. 1 TO RATE SCHEDULE FERC NO. 135 (RS-2 RATE SCHEDULE) BETWEEN CENTRAL VERMONT PUBLIC SERVICE CORPORATION AND CONNECTICUT VALLEY ELECTRIC COMPANY INC.

WHEREAS Central Vermont Public Service Corporation ("Central Vermont") has supplied wholesale power requirements service to Connecticut Valley Electric Company Inc. ("Connecticut Valley") under Central Vermont's Rate Schedule FERC No. 135 ("RS-2 Rate Schedule") and predecessor rate schedules and tariffs; and

WHEREAS it is anticipated that Connecticut Valley will in the foreseeable future cease taking wholesale requirements service from Central Vermont, at which time Connecticut Valley will become, in whole or in part, an unbundled wholesale transmission services customer of Central Vermont; and

WHEREAS upon termination of Connecticut Valley's relationship as a wholesale power requirements customer of Central Vermont, Central Vermont will incur wholesale stranded costs as defined by the Federal Energy Regulatory Commission ("FERC") in 18 CFR § 36.26; and

WHEREAS Central Vermont's RS-2 wholesale stranded costs are calculated in Exhibit 1 hereto; and

WHEREAS the FERC by order issued December 18, 1997, in Docket No. ER97-3435-000, authorized Central Vermont to file an amendment to the RS-2 Rate Schedule to add an Exit Fee to recover its wholesale stranded costs;

NOW THEREFORE, the RS-2 Rate Schedule is hereby supplemented to include the following provisions:

1. *Effective Date.* This Supplement No. 1 to the RS-2 Rate Schedule shall become effective as of March 13, 1998, subject to acceptance for filing by the FERC.

2. *Exit Fee.* As of the date upon which wholesale requirements service to Connecticut Valley under the RS-2 Rate Schedule terminates, Connecticut Valley shall be obligated to pay Central Vermont an Exit Fee in the amount of $44,925,335* which is Central Vermont's wholesale stranded cost as calculated under the methodology set forth in FERC's Regulations at 18 C.F.R. § 35.26(c)(2) and expressed on a net present value basis as of December 31, 1997. This obligation and the payment terms of this Supplement No. 1 shall survive termination of the RS-2 Rate Schedule.

3. *Amortization.* At its option, Connecticut Valley may choose to amortize payment of the Exit Fee over a ten (10)-year period. In such case, Connecticut Valley shall make one hundred and twenty (120) monthly payments of $557,010 to cover the principal amounts due plus interest on the unamortized balances.

---

* The RS-2 Rate Schedule includes an annual cost of service true-up mechanism which could affect the revenue stream estimate underlying the $44,925,335 and $557,010 figures set forth in paragraphs 2 and 3 of this Supplement No. 1. Therefore, notwithstanding the provisions of those paragraphs, the $44,925,335 and $557,010 figures will be recalculated, and revised if necessary, as of May 31, 1998 using the same methodologies shown on Appendix A hereto and using actual calendar year 1997 data for the variable referred to by the FERC as the "Revenue Stream Estimate" or "RSE." Central Vermont will notify Connecticut Valley promptly in writing of any such revision, but need not file the revision with the FERC inasmuch as this Supplement No. 1 already authorizes the revision.

4. *Payment Terms.* Central Vermont shall bill Connecticut Valley for the Exit Fee within thirty (30) days after the Exit Fee obligation accrues. Connecticut Valley shall pay the full amount of the Exit Fee within twenty (20) days thereafter or shall indicate in writing within said twenty (20)-day period that it intends to amortize the payments over ten (10) years. If Connecticut Valley elects to amortize payment of the Exit Fee, it shall include the first month's payment with its response and shall make subsequent payments on or before the twentieth (20th) day of each succeeding month.

EXHIBIT 1 TO SUPPLEMENT NO. 1 TO RATE SCHEDULE FERC NO. 135 (RS-2 RATE SCHEDULE)

A. **Determination of Stranded Cost Obligation ("SCO")**

RS-2 Revenues	$10,593,558
Transmission Revenues	550,938
Revenue Stream Estimate ("RSE")	$10,042,620
RS-2 Variable Costs	2,540,068
Net	$ 7,502,552

Formula: SCO = (RSE - CMVE) x L

SCO = ($10,042,620 - $5,273,414) x 19 years

SCO = $4,769,206 x 19 years

SCO = $90,614,914

The Net Present Value ("NPV") of SCO using a discount rate of 8.27% is: $44,925,335

B. **Determination of Amortized Monthly Exit Fee**

To collect $44,925,335 plus interest over 10 years, a monthly collection of $557,010 is required using the current prime rate of 8.50%, compounded monthly.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause, Article VI, clause 2, of the United States Constitution, provides as follows:

This Constitution, and Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Federal Power Act provides in pertinent part in 16 U.S.C. § 824 as follows:

> (a) Federal regulation of transmission and sale of electric energy.
>
> It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.
>
> (b) Use or sale of electric energy in interstate commerce.
>
> (1) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric

energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

Supreme Court, U.S.
FILED
MAR 15 1999
OFFICE OF THE CLERK

No. 98-1291

In the
Supreme Court of the United States
October Term, 1998

CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION

Petitioners,

v.

DOUGLAS L. PATCH, BRUCE B. ELLSWORTH, and SUSAN S. GEIGER,

Respondents.

BRIEF OF RESPONDENTS DOUGLAS L. PATCH, ET AL. IN OPPOSITION TO THE PETITION

Robert J. Frank
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION
8 Old Suncook Road
Concord, NH 03301

Michael E. Tucci*
Dennis Lane
David D'Alessandro
Steven K. White
John E. McCaffrey
MORRISON & HECKER L.L.P.
1150 18th Street, N.W., #800
Washington, D.C. 20036
(202) 785-9100
Counsel for Respondents

*Counsel of Record
March 15, 1999

1899

QUESTION PRESENTED

Whether a state public utility commission has jurisdiction to find a retail electric utility imprudent for not exercising its right to terminate a wholesale power purchase contract and purchase cheaper alternative power, under a termination provision contained in the wholesale power contract on file with and approved by the Federal Energy Regulatory Commission.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT..... 3

The NHPUC's Finding Of Imprudence Is Not Preempted Under The Federal Power Act..... 4

1. Congress intended a harmonious, dual system of regulation..... 4
2. The filed-rate doctrine does not preempt the NHPUC from finding CVEC imprudent..... 6
3. The NHPUC's exercise of jurisdiction over CVEC's decision not to terminate its purchases comports with every case reviewing the issue..... 9
4. FERC recognizes state authority over purchase decisions.....12

CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 4
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 5
Gulf States Utilities Co. v. Public Util. Comm'n, 841 S.W.2d 459 (Tex. Ct. App. 1992) 10
Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n, 837 F.2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988) 3, 9
Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355 (1986) 4
Mississippi Power & Light Co. v. Moore, 487 U.S. 354 (1988) 3, 7, 8, 13
Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953 (1986) ..... *passim*
Narragansett Elec. Co. v. Burke, 381 A.2d 1358 (R.I. 1977), *cert. denied*, 435 U.S. 972 (1987) 6
New Orleans Pub. Serv., Inc. v. Council of New Orleans, 911 F.2d 993 (5th Cir. 1990), *cert. granted*, 499 U.S. 974, *cert. dismissed*, 502 U.S. 954 (1991) 9
Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507 (1947) 6
Pike County Light and Power Co. v. Pennsylvania Pub. Util. Comm'n, 465 A.2d 735 (Pa. Commw. Ct. 1983) 7, 11, 12
Public Utilities Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943) 5
Public Utilities Comm'n v. Attelboro Steam & Electric Co., 273 U.S. 83 (1927) 5
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 4
Sinclair Machine Products, Inc., 498 A.2d 696 (1985) 11
United States v. Public Utilities Comm'n, 345 U.S 295 (1953) 6

TABLE OF AUTHORITIES -- Continued

Cases - Continued

Wisconsin Pub. Intervenor v. Mortier,
501 U.S. 597 (1991) 4

Statutes

15 U.S.C. § 717 5
16 U.S.C. § 824 5

Agency Orders

Federal Energy Regulatory Commission

Central Vermont Pub. Serv. Corp., 81 F.E.R.C.
(CCH) ¶ 61,336 (1997), *rehearing denied*,
84 F.E.R.C. (CCH) ¶ 61,295 (1998) 8
Central Vermont Pub. Serv. Corp., 84 F.E.R.C.
(CCH) ¶ 61,194 (1998) 9, 12
Doswell Ltd. Partnership, 50 F.E.R.C. (CCH)
¶ 61,251 (1990) 12
Pennsylvania Power and Light Co., 23 F.E.R.C.
(CCH) ¶ 61,325 (1983) 13
Philadelphia Elec. Co., 15 F.E.R.C. (CCH)
¶ 61,264 (1981) 13
Transcontinental Gas Pipe Line Corp.,
57 F.E.R.C. (CCH) ¶ 61,344 (1991) 13

New Hampshire Public Utilities Commission

Connecticut Valley Elec. Co., 71 NHPUC 145 (1986) 2
Re Concord Elec. Co., 69 NHPUC 701 (1984) 2

STATEMENT OF THE CASE

Except for limited purchases mandated by statute, Connecticut Valley Electric Company ("CVEC"), a small retail electric distribution company in New Hampshire, purchases all of the power needed to serve its approximately 10,000 retail customers from its parent, Central Vermont Public Service Corporation ("CVPS"). These purchases are made under a wholesale contract, denominated the RS-2 Rate Schedule, filed with and approved by the Federal Energy Regulatory Commission ("FERC"). CVEC has purchased power from CVPS under the RS-2 Rate Schedule since 1983. In addition to provisions regarding the pricing and other terms of the delivery of electricity, the RS-2 Rate Schedule provides, under Section E, entitled "Termination:"

> Service under this Rate Schedule may be terminated at any time if both the Company and the Customer agree to the termination. If there is no agreement, service may be terminated at the end of a service year if the party seeking termination has given written notice of termination prior to the beginning of that service year.

Pet. App. 131.

The respondents are the Chairman and Commissioners of the New Hampshire Public Utilities Commission ("NHPUC"). Pursuant to its authority under New Hampshire law, the NHPUC first reviewed CVEC's participation in the RS-2 Rate Schedule in 1986. In its order initially approving CVEC's purchases under the RS-2 Rate Schedule, the NHPUC concluded:

> After review and consideration, we find that CVEC has met its burden of proving that its

> participation in the RS-2 rate with CVPS is reasonable....
>
> Our findings and conclusions in this proceeding will not necessarily be the same in future dockets. The terms of the RS-2 tariff provide that CVEC may terminate the arrangement on one calendar year's notice.[n4]
>
> ---
>
> [n4]The Commission has previously provided that it favors power supply arrangements which will allow the Commission to review periodically the decisions of the regulated distribution company. *Re Concord Electric Company*, 69 NHPUC 701, 705, 706 (1984). The one year termination provision in the CVPS RS-2 rate satisfies the Commission's concern in this area.

Connecticut Valley Elec. Co., 71 NHPUC 145, 147 (1986).

In late 1997, the City of Claremont, New Hampshire, where the majority of CVEC's retail customers reside, filed a complaint with the NHPUC alleging that CVEC's continued purchase from CVPS was imprudent. Shortly thereafter, CVEC submitted its annual purchased power cost adjustment and fuel adjustment clause filing with the NHPUC, seeking an increase in retail rates due to an increase in purchased power and fuel costs. At a duly noticed hearing of both matters, the NHPUC considered evidence showing that CVEC could purchase power from entities other than its parent at substantially lower costs than those charged under the RS-2 Rate Schedule. The NHPUC entered an order freezing CVEC's retail rates at their December 31, 1997 level

based on its initial finding that CVEC was imprudent for not terminating the purchases under the RS-2 Rate Schedule. Pet. App. 114-116. The District Court entered an injunction requiring that the NHPUC allow CVEC's proposed higher rates to go into effect. Pet. App. 79. The First Circuit vacated that injunction in its opinion dated December 3, 1998. Pet. App. 1.

REASONS FOR DENYING THE WRIT

The NHPUC, in the exercise of its statutorily mandated authority, ruled that CVEC was imprudent because it elected to continue purchasing power from its parent despite (1) CVEC's contractual ability to terminate those purchases and (2) the availability of cheaper alternative power supplies. Nothing about that ruling warrants United States Supreme Court review. The decision of the First Circuit Court of Appeals upholding the NHPUC's authority is based on the clear and unambiguous language contained in the contract on file with and approved by FERC, is in accord with a decision of the Third Circuit Court of Appeals in a similar context, *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988), and is within the exception to the filed-rate doctrine recognized by this Court in *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 972 (1986) (observing that "a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower-cost power is available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*."). *Accord Mississippi Power & Light Co. v. Moore*, 487 U.S. 354 (1988). Because the First Circuit decision does not create a conflict in the circuit courts, does not raise any issue of national importance, does not contravene FERC's own understanding of its jurisdiction, and does not conflict with the rulings of this Court

concerning the limits of federal jurisdiction, the writ should be denied.

The NHPUC's Finding Of Imprudence Is Not Preempted Under The Federal Power Act.

1. Congress intended a harmonious, dual system of regulation.

Where a federal statute is applicable, the scope of the preemptive power of that law depends on congressional intent. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991). As the Court explained in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229-30 (1947) (citations omitted): "Congress may, if it chooses, take unto itself all regulatory authority, . . . share the task with the States, or adopt as federal policy the state scheme of regulation. The question in each case is what the purpose of Congress was." When considering questions of preemption, the analysis must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wisconsin Pub. Intervenor*, 501 U.S. at 605 (quoting *Rice*, 331 U.S. at 230).

The instant case involves the regulation of electric utilities, which this Court has recognized to be "one of the most important of the functions traditionally associated with the police powers of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Given its importance under the police power of the States, traditional state regulation of utilities cannot be preempted unless there is a "clear and manifest" intent to do so in the federal statutory scheme. *See Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 369 (1986).

The Federal Power Act, 16 U.S.C. § 824 *et seq.* ("FPA"), shows no "clear and manifest" intent to supersede the traditional state regulation of utilities. To the contrary,

> It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry – federal and state regulatory bodies operating side by side, each active in its own sphere.

Public Utilities Comm'n v. United Fuel Gas Co., 317 U.S. 456, 467 (1943) (citation omitted).[1]

A dual system of regulation was needed to "fill the gap" in regulation over interstate sales and transmission of electricity found to exist by *Public Utilities Commission v. Attelboro Steam & Electric Co.*, 273 U.S. 83 (1927). The FPA was expressly designed to assert federal regulation over this gap: "Congress interpreted [*Attleboro*] as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with

---

[1] Although this case interpreted the jurisdictional provisions of the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, the provisions of that Act are virtually identical to those in the Federal Power Act regarding the scope of federal jurisdiction, and cases interpreting equivalent sections of the two acts may be cited interchangeably. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

precisely that power." *United States v. Public Utilities Comm'n*, 345 U.S 295, 307-308 (1953). This interpretation guided the delineation of federal and state jurisdiction under the FPA:

> The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed.

Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507, 517 (1947). Thus, state utility commissions retain jurisdiction over all matters relating to the regulation of electric energy unless Congress has specifically conferred jurisdiction on FERC.

2. The filed-rate doctrine does not preempt the NHPUC from finding CVEC imprudent.

One preemption doctrine that has emerged is the so-called "filed-rate doctrine." Under this doctrine, a state may not substitute its judgment about cost elements reviewed by FERC in approving a wholesale tariff to prevent a wholesale purchaser from recovering at retail the costs of paying a FERC-approved wholesale rate. *See, e.g., Narragansett Elec. Co. v. Burke*, 381 A.2d 1358, 1362 (R.I. 1977), *cert. denied*, 435 U.S. 972 (1978).

Subsequent decisions under the filed-rate doctrine demonstrate that federal preemption of state utility commissions can occur in three ways, none of which is implicated by the actions of the NHPUC in this case. First,

once FERC sets a wholesale rate as just and reasonable, no court may alter that particular rate on the ground that, in its opinion, a different rate is more reasonable. *Nantahala*, 476 U.S. at 966. Second, in setting just and reasonable wholesale rates, FERC's determination encompasses both the rates themselves and the FERC-mandated power allocations or cost allocations that affect wholesale rates. *Id.*; *Mississippi Power*, 487 U.S. at 371. Finally, once FERC approves the wholesale rates, a state utility commission may not prevent a regulated utility from passing through those rates to retail customers. *Nantahala*, 476 U.S. at 970; *Mississippi Power*, 487 U.S. at 372.

A well recognized exception to the filed-rate doctrine has also developed. That exception, first recognized in *Pike County Light and Power Co. v. Pennsylvania Public Utility Commission*, 465 A.2d 735, 738 (Pa. Commw. Ct. 1983) holds that while a state cannot review the reasonableness of the wholesale rate set by FERC, the state may determine whether it is in the public interest for a purchaser under its jurisdiction to purchase that power in light of its available alternatives. This Court has recognized the exception to the filed-rate doctrine in both *Mississippi Power*, 487 U.S. at 373-74, and *Nantahala*, 476 U.S. at 972, where this Court assumed, without deciding, that "it might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power, even at FERC-approved rates, if it had the legal right to refuse to buy that power." In this matter, CVEC has the legal right under the FERC-approved RS-2 Rate Schedule to terminate further purchases from its parent. *See* Pet. App. 131.

The NHPUC's determination that CVEC was imprudent for failing to exercise its termination rights is not preempted by FERC's approval of the underlying rate schedule. CVEC, a retail distribution company, is not subject to the jurisdiction of FERC, and FERC has not and could not

determine the prudence of CVEC's purchases from CVPS. Further, the NHPUC's action has not disturbed or challenged the rate charged by CVPS under the RS-2 Rate Schedule. CVPS is free to charge the RS-2 rate to whomever is willing to pay it. The NHPUC simply found that, given available lower-priced alternatives, CVEC was imprudent for not exercising its right pursuant to the contract to terminate, and instead continuing to purchase from CVPS.

Despite the petitioners' arguments to the contrary, Petition at 16-19, there is no FERC-mandated allocation of costs affecting the wholesale rates in the RS-2 Rate Schedule. The RS-2 Rate Schedule contains formulae which are used to compute unit rates to recover CVPS's systemwide costs. The principal rates are the energy rate and the capacity rate. The energy rate is computed by dividing CVPS's energy costs by total kilowatt hours of energy produced or purchased for sale to all CVPS customers, including CVEC. The formula does not produce a separate CVEC unit rate, but a total CVPS system unit rate. The capacity rate is a monthly rate and is computed as one-twelfth of the product of CVPS's annual generation and transmission capacity cost and CVEC's proportional usage of those facilities. Fundamentally, both the capacity and energy rate charged to CVEC are based on usage, and, thus, the RS-2 Rate Schedule cannot be said to contain an interstate allocation agreement. Pet. App. 132-135, 142-150. Most importantly, on two separate occasions, FERC has ruled that the RS-2 Rate Schedule is not an allocation agreement. *Central Vermont Pub. Serv. Corp.*, 81 F.E.R.C. (CCH) ¶ 61,336 at 62,542-3 (1997), *rehearing denied*, 84 F.E.R.C. (CCH) ¶ 61,295 at 62,371 (1998). Specifically, FERC found:

> This case does not present the same fact situation as *Mississippi Power* or *Nantahala*. The Commission, through its approval of the wholesale rate schedule between Central

> Vermont and Connecticut Valley, did not dictate a specific cost or power allocation of the type at issue in *Mississippi Power* or *Nantahala*. Additionally, in approving the rates, terms and conditions of the RS-2 rate schedule, the Commission did not make any determination that it was prudent for the purchaser to enter into the contract in the first place, or whether, over time, it has become imprudent for the purchaser not to exercise its termination rights under the contract in order to purchase cheaper power elsewhere.

Central Vermont Pub. Serv. Corp., 84 F.E.R.C. (CCH) ¶ 61,194 at 61,975 (1998). Therefore, because the NHPUC's actions do not disturb the wholesale RS-2 rate and the RS-2 Rate Schedule does not contain a FERC-mandated allocation of costs, no action of the NHPUC is precluded under the filed-rate doctrine.[2]

3. The NHPUC's exercise of jurisdiction over CVEC's decision not to terminate its purchases comports with every case reviewing the issue.

In 1988, the Third Circuit had occasion to review a state commission's decision finding a utility's continued gas purchases from an affiliate at FERC-approved rates imprudent given the availability of cheaper alternatives. *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941

---

[2] Nor does this case involve a situation similar to *New Orleans Public Service, Inc. v. Council of New Orleans*, 911 F.2d 993 (5th Cir. 1990), *cert. granted*, 499 U.S. 974, *cert. dismissed*, 502 U.S. 954 (1991). In that case, there was an allegation that action of the Council of New Orleans affected a FERC-mandated cost allocation concerning Grand Gulf nuclear costs. Here, there is no cost allocation approved or mandated by FERC and thus the issues are distinct.

(1988). The Third Circuit confirmed the authority of the Pennsylvania Public Utility Commission to find that the distributor acted imprudently in continuing to purchase from its affiliate despite the fact that the gas being purchased was sold at a FERC-approved price. In upholding the Pennsylvania Commission's authority, the Court stated:

> Although *Nantahala* underscores that a state cannot independently pass upon the reasonableness of a wholesale rate on file with FERC, it in no way undermines the long-standing notion that a state commission may legitimately inquire into whether the retailer prudently chose to pay the FERC-approved wholesale rate of one source, as opposed to the lower rate of another source.

Id. at 609. Thus, the Third Circuit and First Circuit are in accord on the issue.

All other courts considering the issue have recognized the ability of the appropriate state regulatory body to review purchase decisions in evaluating the reasonableness of retail rate tariffs. No court has found that federal authority precludes such review:

> Section 824 of the FPA expressly grants FERC jurisdiction to regulate *sales* of wholesale power in interstate commerce; FERC's inquiry focuses on the rates at which *sellers* market their power. FERC does not review the market conditions or other factors that govern the prudence of the purchaser's decision to buy power in the wholesale transaction.

Gulf States Utilities Co. v. Public Util. Comm'n, 841 S.W.2d 459, 465 (Tex. Ct. App. 1992). That Court went on, after

conducting a thorough review of the prior case law, including FERC precedent, to indicate that where "a utility has a choice to purchase a particular quantity of power at a particular price, the state may properly review the utility's prudence in incurring that expense." *Id.* at 469.

In the instant matter, FERC's review of the RS-2 Rate Schedule focused on the reasonableness of CVPS's wholesale rate, which was not at issue before the NHPUC. In contrast, the NHPUC addressed CVEC's purchase decision in light of the alternatives and its ability to terminate the contract with CVPS. The NHPUC may properly address this issue under the authority reserved to the states:

> The FERC focuses on [the wholesaler] to determine whether it is just and reasonable *for that company to charge* a particular rate, but makes no determination of whether it is just and reasonable *for [the retailer] to incur* such a rate as an expense. The PUC, on the other hand, has no jurisdiction to analyze [the wholesaler's] cost of service and makes no determination as to the reasonableness for [the wholesaler] to charge its rates. The PUC focuses on [the retailer] and its cost of service data to determine whether it is reasonable for [the retailer] to incur such costs in light of available alternatives.

Pike County, 465 A.2d at 738.

The Supreme Court of New Hampshire also recognized the guiding principle in *Sinclair Machine Products, Inc.*, 498 A.2d 696, 699 (1985):

> The PUC correctly determined under federal preemption principles that FERC approval of wholesale rate precludes the PUC from

> questioning the *reasonableness of that charge.* However, it does not follow *automatically* that the PUC must find that power costs incurred under a wholesale rate are *necessarily a reasonable expense for the retailer.*

Because CVEC could exercise its termination rights and purchase cheaper power elsewhere, it had a choice of power suppliers. CVEC's failure to avail itself of those alternatives is properly subject to a prudence review by the NHPUC.

4. FERC recognizes state authority over purchase decisions.

The NHPUC's exercise of jurisdiction over CVEC's purchase decisions is consistent with FERC's understanding of the jurisdictional boundaries of federal and state authority. FERC has repeatedly indicated that States are free to evaluate the reasonableness of a retail utility's (here, CVEC) purchase decisions, despite a FERC finding of reasonableness regarding the rates charged by the wholesaler (here, CVPS) supplying the utility. In the context of the present controversy, FERC has ruled:

> The Commission's decisions and its long-standing practice in setting wholesale rates support the *Pike County* exception to the *Narragansett* doctrine. . . . [A] state commission is not precluded under the FPA from reviewing the prudence of a wholesale purchase that was made at Commission-approved rates if the purchaser had other legal choices available.

Central Vermont Pub. Serv. Corp., 84 F.E.R.C. (CCH) ¶ 61,194 at 61,975 (1998). *See also, Doswell Ltd. Partnership*, 50 F.E.R.C. (CCH) ¶ 61,251 at 61,758, n.18 (1990) (stating that FERC "reaffirms its conclusion that the Supreme Court's

decisions in [*Nantahala*] or subsequent cases, do not preclude state regulators from reviewing the prudence of a utility's purchasing decisions."); *Pennsylvania Power and Light Co.*, 23 F.E.R.C. (CCH) ¶ 61,325 at 61,716 (1983) ("We do not view our responsibilities under the Federal Power Act as including a determination that the purchaser has purchased wisely or has made the best deal available."); *Philadelphia Elec. Co.*, 15 F.E.R.C. (CCH) ¶ 61,264 at 61,601 (1981) (stating that "we do not mean by this order to prejudge, for our own purposes or those of the respective state commissions, a determination of the prudence of either party in entering into this transaction."); *Transcontinental Gas Pipe Line Corp.*, 57 F.E.R.C. (CCH) ¶ 61,344 at 62,114 (1991) ("state commissions retain the authority under applicable law to investigate the prudence of [local distribution company] gas purchasing practices.").

FERC's interpretation of its jurisdictional authority is entitled to deference. *See, e.g., Mississippi Power*, 487 U.S. at 380-82 (Scalia, J., concurring) ("it is settled law that the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction.") (citations omitted). FERC has determined that a prudence inquiry regarding power purchases by a retail utility with a choice of suppliers is a matter to be resolved by the appropriate state commission.

CONCLUSION

For the foregoing reasons, the Petition for writ of *certiorari* should be denied.

Respectfully submitted,

Robert J. Frank
NEW HAMPSHIRE
PUBLIC UTILITIES
COMMISSION
8 Old Suncook Road
Concord, NH 03301

Michael E. Tucci*
Dennis Lane
David D'Alessandro
Steven K. White
John E. McCaffrey
MORRISON & HECKER L.L.P.
1150 18th Street, N.W., #800
Washington, D.C. 20036
(202) 785-9100
Counsel for Respondents

*Counsel of Record
March 15, 1999

(3)

No. 98-1291

Supreme Court, U.S.
FILED
MAR 29 1999
CLERK

In The

Supreme Court of the United States

October Term, 1998

CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

Petitioners,

v.

DOUGLAS L. PATCH, BRUCE B. ELLSWORTH, and SUSAN S. GEIGER,

Respondents.

On Petition For Writ Of *Certiorari* To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY

JOSEPH M. KRAUS
Vice President and General Counsel
Central Vermont Public Service Corporation
77 Grove Street
Rutland, VT 05701-3402
(802) 747-5429

DOM S. D'AMBRUOSO
JOHN T. ALEXANDER
RANSMEIER & SPELLMAN
One Capitol Street
P.O. Box 600
Concord, NH 03302-0600
(603) 228-0477

LEE A. FREEMAN, JR.*
JAMES T. MALYSIAK
JOHN F. KINNEY
GLYNNA W. FREEMAN
FREEMAN, FREEMAN & SALZMAN, P.C.
401 North Michigan Avenue
Suite 3200
Chicago, IL 60611-4207
(312) 222-5100

Counsel for Petitioners Connecticut Valley Electric Company and Central Vermont Public Service Corporation

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11 28

TABLE OF CONTENTS

Page

PETITIONERS' REPLY 1

1. This Court's Holding in *Mississippi Power & Light* Should Not Be Limited to Its Facts, Nor Should *Montana-Dakota Utilities* Be Overruled 1

2. The First Circuit's Decision Permits the State Commission to Undertake a Prudence Review of an Interstate Power System's Allocation Agreement, Precisely the Issue this Court Granted *Certiorari* to Decide in *NOPSI IV* 4

3. Any Prudence Review Should Have Been Conducted by FERC 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Gulf States Utilities Co. v. Public Util. Comm'n, 841 S.W.2d 459 (Tex. App. 1992) 8

Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n, 837 F.2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988) 8

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) ..... *passim*

Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951) ..... *passim*

New Orleans Pub. Serv., Inc. v. Council of New Orleans ("NOPSI IV"), 911 F.2d 993 (5th Cir. 1990), *cert. granted*, 499 U.S. 974, *cert. dismissed*, 502 U.S. 954 (1991) 4, 5, 6

Pike County Light and Power Co. v. Pennsylvania Pub. Util. Comm'n, 465 A.2d 735 (Pa. Commw. Ct. 1983) 8

Sinclair Machine Products, Inc., Appeal of, 498 A.2d 696 (1985) 8

State ex rel. Pittman v. Mississippi Pub. Serv. Comm'n, 506 So.2d 978 (Miss. 1987) 8

AGENCY ORDERS

Central Vermont Pub. Serv. Corp., 81 F.E.R.C. ¶ 61,336, *rehearing denied*, 84 F.E.R.C. 61,295 (1998) 5

PETITIONERS' REPLY

The brief in opposition filed by the respondent Commissioners of the New Hampshire Public Utilities Commission ("NHPUC") principally relies upon the fact that the Federal Energy Regulatory Commission ("FERC") did not affirmatively "dictate" the allocation of wholesale power and costs between petitioners Central Vermont Public Service Corporation ("CVPS") and Connecticut Valley Electric Company ("CVEC"). (Br. Opp. 8-9) Instead, FERC accepted the RS-2 Rate Schedule for filing "as just and reasonable" without objection. But *Mississippi Power & Light Co.*[1] expressly holds that the preemptive effect of a filed rate does not depend on whether (i) FERC affirmatively mandates or (ii) merely accepts the contracting parties' allocation agreement. The distinction drawn by the NHPUC and FERC to persuade the First Circuit to vacate the District Court's preliminary injunction violates both the federal policy and the logic of this Court's filed-rate case law.

1. This Court's Holding in *Mississippi Power & Light* Should Not Be Limited to Its Facts, Nor Should *Montana-Dakota Utilities* Be Overruled.

The FERC/NHPUC distinction between an affirmative FERC order allocating power between affiliates of an integrated interstate power system and a FERC order that accepts the contracting parties' uncontested allocation would restrict this Court's holding in *Mississippi Power &*

---

[1] *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

Light to its facts and overrule *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-252 (1951). This Court should instead hold that the filed-rate doctrine as enunciated in *Mississippi Power & Light* applies in full force whenever FERC accepts the contracting parties' uncontested allocation agreement.

The fundamental holding of *Mississippi Power & Light* is that the allocation of power and its attendant cost between affiliates of an integrated interstate power system is solely within FERC's province and beyond prudence review by State commissions. The policy behind that holding is clear: State prudence review of such interstate allocations would lead to a balkanized wholesale power system in which one State seeks to shift unwanted power costs to affiliates operating in other States, the other affected States retaliate, and the interstate system is confronted with the dilemma of complying with inconsistent State obligations. *Mississippi Power & Light* preempted the issue by confirming that FERC has exclusive jurisdiction over such interstate power allocations.

The First Circuit in this case accepted the NHPUC's and FERC's argument that *Mississippi Power & Light* should extend only to cases in which FERC has affirmatively mandated a particular allocation between interstate affiliates. In that case, FERC had disagreed with the affiliates' allocation agreement and instead ordered that the system's power and costs be allocated on the basis of the affiliates' proportionate peak demands for power. Nowhere in *Mississippi Power & Light* did this Court indicate that its holding was dependant on the fact that FERC had mandated a reallocation. Here, the RS-2 Rate Schedule adopts precisely the same allocation as FERC required

in *Mississippi Power & Light* based on CVEC's and CVPS's proportionate peak demands, 487 U.S. at 362-364, and that agreement, never challenged at FERC by the NHPUC or any other interested party, was accepted as "just and reasonable" by FERC without any reallocation. Neither the NHPUC nor FERC suggests any reason why the outcome should be different here or why State commissions under these facts should be able to undertake the prudence review barred by *Mississippi Power & Light* and shift unwanted power costs to other States.

But the First Circuit's error goes well beyond violating federal policy and logic. *Mississippi Power & Light* followed this Court's original filed-rate decision in *Montana-Dakota Utilities*, which held that a filed rate preempts State jurisdiction both when the rate is affirmatively fixed by FERC and also when the rate is "merely accepted by the Commission." 341 U.S. at 251-252. This Court in *Mississippi Power & Light reversed* the Mississippi Supreme Court's decision that State prudence review of the allocation of power to an affiliate of an interstate system was permissible as long as FERC had not affirmatively decided that the allocation was prudent:

> The Mississippi Supreme Court erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings. . . . We have long rejected this sort of "case-by-case analysis of the impact of state regulation upon the national interest" in power regulation cases. . . . Congress has drawn a bright line between state and federal authority

> in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. 487 U.S. at 374 (citations omitted).

The result of the First Circuit's decision is to create substantial doubt concerning the application of the filed-rate doctrine to an uncontested interstate system allocation agreement just as restructuring initiatives in many States are disrupting long-established power supply and allocation arrangements.

2. The First Circuit's Decision Permits the State Commission to Undertake a Prudence Review of an Interstate Power System's Allocation Agreement, Precisely the Issue this Court Granted *Certiorari* to Decide in *NOPSI IV*.

The First Circuit's failure to uphold the filed-rate doctrine under the facts of this case enables a State commission to decide the prudence of a power allocation agreement between affiliates of an interstate system. Not surprisingly, New Hampshire's decision that the allocation is imprudent shifts costs either to the ratepayers in another State, Vermont, or to the shareholders of the interstate system. Therefore, this cost-shifting will adversely affect CVPS's capability to provide service to Vermont consumers. Moreover, New Hampshire's parochial action threatens to destroy the interstate system itself, without any action by FERC.

This same issue was raised in *New Orleans Pub. Serv., Inc. v. Council of New Orleans* ("*NOPSI IV*"), 911 F.2d 993 (5th Cir. 1990), *cert. granted*, 499 U.S. 974, *cert. dismissed*, 502 U.S. 954 (1991), and this Court was poised to decide

it. The case was settled before decision, however, and thus the issue remains unresolved.

The NHPUC relegates *NOPSI IV* to a footnote (Br. Opp. 9 n.7) and attempts to distinguish it by denying that there is a similar power allocation agreement here. But the NHPUC's contention is a *non sequitur*. It argues that because the RS-2 Rate Schedule calculates CVEC's costs on the basis of overall system costs, not through a separate CVEC unit cost, and the amount that CVEC pays is therefore determined by its usage, RS-2 cannot be considered an allocation agreement. *Id.* at 8. Nowhere does the NHPUC explain why the method used in the RS-2 Rate Schedule to calculate CVEC's costs precludes it from being an interstate allocation agreement. To the contrary, as the NHPUC admits, that CVEC's power costs under RS-2 is based upon "CVEC's proportional usage of those [interstate system] facilities." *Id.* An allocation method that determines an affiliate's share of systemwide cost based upon its proportionate usage – the method used in RS-2 – is exactly what FERC required in *Mississippi Power & Light*.

The NHPUC also argues that "on two separate occasions FERC has ruled that the RS-2 Rate Schedule cannot be said to contain an interstate allocation agreement." (Br. Opp. at 8, *citing Central Vermont Pub. Serv. Corp.*, 81 F.E.R.C. (CCH) ¶ 61,336 at 62,542-3, *rehearing denied*, 84 F.E.R.C. (CCH) ¶ 61,295 at 62,371 (1998).) In fact, FERC did not decide whether the RS-2 Rate Schedule was an allocation agreement, but instead held that the fact that it had not "dictated" the power allocation contained in the Schedule made *Mississippi Power & Light* inapplicable, thereby violating the holding of *Montana-Dakota Utilities*

that the filed-rate doctrine applies in full force even where FERC has merely accepted an uncontested filing and has not had to order a modification of the filing.

Just as in *NOPSI IV*, the State commission here attempts to evade the filed-rate doctrine by disguising its action as "ordinary, state prudence-review ratemaking." Just as clearly as in *NOPSI IV*, the State commission in fact is invading the exclusive federal domain of interstate power regulation. What is different here is that FERC, which strenuously fought against State intrusion in *NOPSI IV*, is facilitating that encroachment and attempting a substantial expansion of State authority over interstate transactions through a narrowing of the filed-rate doctrine. Such a fundamental change in the dividing line between federal and State jurisdiction over interstate power transactions, resulting in a shift in authority at odds with the policy that led to this Court's holding in *Mississippi Power & Light*, should not be permitted without full review by this Court.

3. Any Prudence Review Should Have Been Conducted by FERC.

The NHPUC premises its assertion of jurisdiction to review the prudence of CVEC's decision not to terminate the RS-2 Rate Schedule on the termination clause of that Schedule's evergreen provision. The NHPUC treats the termination issue as one between independent, arm's-length firms in which a mere comparison between the contractual price and available prices from other suppliers determines whether termination is prudent. The NHPUC ignores the fact that CVEC was incorporated

solely to enable CVPS to continue to supply retail power in New Hampshire. CVEC has no employees of its own; it is entirely controlled by CVPS. Under these circumstances, termination of the RS-2 Rate Schedule will cause the termination of the entire interstate system. The decision whether an integrated interstate power system should be terminated is a matter within FERC's exclusive jurisdiction over interstate power transactions. Compelling such termination is in no sense "ordinary ratemaking" by a State commission. Therefore, however the termination clause of the RS-2 Rate Schedule is construed,[2] it does not provide the NHPUC with jurisdiction to determine whether the CVPS/CVEC system should be terminated or, if so, what the terms of any termination must be.

FERC has never expressly ruled on the prudence of CVEC's decision not to terminate the RS-2 Rate Schedule because no one has asked it to review the matter, not for lack of jurisdiction. As this Court stated in *Mississippi Power & Light*, "[t]he question of prudence was not discussed, however, because no party raised the issue, not

---

[2] In the underlying litigation from which this Petition arises, the parties dispute whether the termination clause permits CVEC to terminate the RS-2 Rate Schedule unconditionally even though CVPS has made long-term commitments to obtain the power needed for CVEC's New Hampshire customers or instead whether such termination would require compensating CVPS for its stranded costs. That disputed issue does not affect the filed-rate issue raised by the Petition because, however the termination clause is interpreted, the NHPUC does not have authority to determine whether it is prudent to terminate the CVPS/CVEC system, which instead is a matter within FERC's exclusive jurisdiction.

because it was a matter beyond the scope of FERC's jurisdiction." 487 U.S. at 375.

Rather than allow the NHPUC, FERC, and the First Circuit to abridge the filed-rate doctrine as it applies to interstate power systems and limit *Mississippi Power & Light* to its facts, this Court should grant *certiorari* to restrict the so-called *Pike County*[3] exception to the filed-rate doctrine to circumstances not impinging on exclusive federal jurisdiction and policy over interstate power transactions.[4]

---

[3] *Pike County Light and Power Co. v. Pennsylvania Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983).

[4] The cases cited by the NHPUC as supporting its assertion of jurisdiction dealt with very different circumstances.

In *Gulf States Utilities Co. v. Public Util. Comm'n*, 841 S.W.2d 459, 468 (Tex. App. 1992), the court specifically found that, unlike CVEC here, "Gulf States is not a participant in an integrated pooling arrangement which might invoke FERC's exclusive jurisdiction."

The Third Circuit in *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 610-611 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988), found *as a factual matter* that the plaintiff had failed to prove that the State commission's rate order disallowed costs required to be paid as a guarantee for a long-term supply of gas under the FERC-approved contract and therefore did not violate the filed-rate doctrine.

Finally, the New Hampshire Supreme Court's decision in *Appeal of Sinclair Machine Products, Inc.*, 498 A.2d 696 (1985), took an unduly narrow view of the filed-rate doctrine. The Mississippi Supreme Court relied upon *Sinclair* in *State ex rel. Pittman v. Mississippi Pub. Serv. Comm'n*, 506 So.2d 978, 986 (Miss. 1987), and was in turn reversed by this Court, 487 U.S. at 374, which reaffirmed that FERC's exclusive jurisdiction is not limited to matters it expressly decides.

CONCLUSION

For the reasons stated in the Petition and in this Reply, the petitioners ask the Court to issue a writ of *certiorari* and reverse the First Circuit's decision.

Respectfully submitted,

JOSEPH M. KRAUS
Vice President and
General Counsel
Central Vermont Public
Service Corporation
77 Grove Street
Rutland, VT 05701-3402
(802) 747-5429

DOM S. D'AMBRUOSO
JOHN T. ALEXANDER
RANSMEIER & SPELLMAN
One Capitol Street
P.O. Box 600
Concord, NH 03302-0600
(603) 228-0477

LEE A. FREEMAN, JR.*
JAMES T. MALYSIAK
JOHN F. KINNEY
GLYNNA W. FREEMAN
FREEMAN, FREEMAN &
SALZMAN, P.C.
401 North Michigan
Avenue
Suite 3200
Chicago, IL 60611-4207
(312) 222-5100

Counsel for Petitioners Connecticut Valley Electric Company and Central Vermont Public Service Corporation

Dated: March 22, 1999

**Counsel of Record*